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The Reform of Procedure

in the Courts as a Means of Preserving the Respect and Confidence of the People in the Government

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THERE is a disposition in some quarters to indulge in captious criticism of the administration of the law, and this tendency if unchecked will seriously impair the respect and confidence of a portion of the people in the government.

The part of the community that is likely to be affected by these wholesale attacks is that portion in which respect for law and order is most easily disturbed, and in which above all others it should be preserved.

Our government is one of laws, and if a majority of our people should at any time take it upon themselves to administer justice by lynch law or by the ballot, the present form of the government would cease to exist and something else would be substituted in its place.

"In the mild season of peace," says Hamilton, speaking of the founders of the Constitution, "with minds unoccupied by other subjects, they passed many months in cool, uninterrupted, and daily consultation; and finally, without having been awed by power, or influenced by any passions except love for their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils." (Federalist, art. 2).

The fundamental idea underlying this government thus formulated was that it should be one of laws, and not of men, and should be representative in character, with checks and balances, the equilibrium of which was to be preserved by a judicial system, all subject to the control of the people by appropriate amendments to the Constitution which guaranteed to every state in the Union "a republican form of government."

Not only was the judicial system established to see that the departments of the government kept within the orbit prescribed for them in the Constitution, but it was also intended as an instrument to secure to every citizen certain rights and privileges guaranteed to him by the Constitution, and to see to it that those rights and privileges were preserved to the humblest citizen against the influence of the most powerful citizen, and to a minority of the members against the arbitrary action of a majority of the members.

Not only was it deemed necessary to see to it that in departmental matters there should be no usurpation of authority, but that each member in the community should be safeguarded in his rights and privileges against the domination of any other member or of a group of members or even of a majority of the members.

There are certain inalienable rights which belong to man irrespective of any

form of government. Until he organizes himself into society he must protect himself in the possession of these rights as best he can. Among these rights as expressed in the Declaration of Independence are "life, liberty, and the pursuit of happiness." Governments are instituted to protect these rights against encroachment, not only by the government itself, but by a majority of the people constituting the government.

It was to enforce and protect these rights that the colonists made war upon the British monarch, declaring that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

In order to secure and preserve these rights a representative government was organized to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

One of the most powerful means provided by the framers of the Constitution to protect these inalienable rights, and not only "to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part," was the creation of a judicial department, concerning which Hamilton says: "Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. *Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.* But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community." (Federalist, art. 78).

Captious Criticism of the Courts.

The present disposition to attack the courts, its members, and the judicial system generally, extends beyond that which has existed at any other time in the history of the country.

These attacks upon the courts take the form of articles in periodicals, and of utterances by prominent members of the community, and are directed toward the character of the decisions of the courts, particularly where constitutional questions are involved, and against the method of procedure in the administration of the law.

So far as the character of the decisions is concerned, the people have become educated to a keen sense of right and wrong, and they have become accustomed to weighing the reasons of the decisions according to their sense of justice and equity.

The old reverence that attached to the courts has passed away, and their decisions will not now be accepted merely because they have been rendered by a bench of judges, but in order to avoid criticism they must stand the test of being just and fair, as well as constitutionally correct.

The people have always insisted that the courts must be capable, diligent, honest, and free from every taint of suspicion, but they are now imposing another test, namely, that their decisions must be sound and just.

This modern view takes the shape of a demand for the recall of judges, or for a referendum of decisions on constitutional questions affecting the whole community, or for both of these remedies.

The people are looking around for a means to correct social and industrial evils, and the idea of recall and referendum has been seized upon as one of the instruments to accomplish that end.

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The people will not stop even at these correctives, if personal and political ambitions in public life are not subordinated to the rectification of what Lincoln called the "real issue," the "eternal struggle" between right and wrong, "that have stood face to face from the beginning of time; and will ever continue to struggle."

The people will not be denied in their efforts to correct social and industrial evils, but the remedies proposed should not go to the length of breaking down substantially fundamental principles underlying the framework of the government.

The general impression upon the ordinary mind that the judicial system as a political issue, and as a subject of wholesale criticism, makes is calculated to destroy the confidence and respect of the masses of the people, not merely in the judicial system, but in representative government, which respect and confidence is back of the Constitution, back of all laws, and back of the judiciary, and is the binding force which keeps the governmental structure from falling apart.

It is as important to the maintenance of government that the administration of law and order should be respected as that there should be fixed rules governing the conduct of the members of the community.

The unavoidable result of the discussion and criticism of the judiciary carried to its logical conclusion means the assumption of the right to secure justice without restraint by law.

Checks and Balances Imposed by the Constitution.

The founders of the Constitution apprehending the difficulty of preserving the proper relation of the different parts of the government to each other, in addition to all other checks upon arbitrary exercise of power, established a judicial system to see that the rights and privileges granted were not overridden.

They provided for three main departments each as a check upon the other.

The Congress was to pass laws upon subjects over which it was given jurisdiction, but the President was given a veto power before the laws became effective, and then, for the protection of all the people, there was created the Supreme Court to determine whether or not the Congress and the President in the enactment of the laws had exceeded their authority under the Constitution.

The members of the House of Representatives were made elective by the people according to the population of each state, but the members of the Senate were to be chosen by the legislatures of the states without regard to population.

The Congress and the President were further restricted by certain fundamental principles, in opposition to which no valid legislation could be enacted, and the Supreme Court was created to see that these principles were not violated.

Checks Imposed upon the People Themselves by the Constitution.

But not only were the departments and officers of the government restrained in the exercise of their functions by appropriate checks and balances, but the peo-

ple themselves imposed restraints upon their own power.

With respect to the necessity for these precautions, Madison, says: "It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. *A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*" (Federalist, art. 51).

One of the features of the Constitution which shows the care with which its framers intended to guard its provisions against hasty action by the people themselves is shown by the method therein provided for amending that instrument. It was contemplated that it might be necessary to change the Constitution to correct defects in it, and the provisions contained in that document respecting its amendment not only guard against overhasty revision by the people themselves, but provide a sufficient means for correcting fundamental decisions of the courts upon constitutional questions. Final action under the Constitution upon all questions, governmental or otherwise, is left to the people; but action cannot be taken directly, but must be exercised through representatives in Congress or in conventions, for the Constitution provides that amendments to it shall be made by Congress, or by a convention called for that purpose, and that amendments proposed are to become effective when ratified, not by the people directly, but by the legislatures of three fourths of the several states, or by the conventions in three fourths thereof.

The intention to protect the government against the people themselves is shown in many parts of the Constitution, as for instance in the provision for the election of a President, who is to be elected, not by the direct vote of the people, but by electors chosen by the people, who are to assemble in convention and thus make the selection.

The smallest and weakest state was protected against the largest and most powerful by providing that the members of the House of Representatives should be elected directly by the people, and that the members of the senate should be chosen by the legislatures of the states, an equal number for each state.

In order still further to safeguard the rights of all the people against the power of the government, certain fundamental rights were guaranteed to all the people, such as freedom of worship, freedom of speech, and freedom of the press, the right to assemble and petition, the right to keep and bear arms, the right to freedom from the quartering of troops, the right to freedom from unreasonable searches and seizures, the right not to be twice put in jeopardy for the same offense, the right not to be compelled to be a witness against himself, the right not to be deprived of life, liberty, or property without due process of law, the right not to have private property taken for public use without just compensation, the right to be entitled to a speedy and public trial by an impartial jury in all criminal prosecutions and to have the right to trial by jury in certain civil cases,—all of which would be idle words had not the same instrument placed the Supreme Court on guard to see that these rights were preserved to the humblest citizen of the land.

Function of the Judicial System in the Plan of the Constitution.

These checks and balances upon the government could not be maintained, and these fundamental rights could not be preserved, except through the agency of a judicial system created to adjudicate upon them, not as particular individuals may require, not as a group of individuals may desire, not as a majority of the voters may wish, but as the best interest of all the people demand, and in the terms and spirit in which they were formulated until modified as provided by the Constitution.

Aside from the objection that it would be unjust to submit some constitutional

questions to popular vote, and not all of them; that it would be impracticable to submit all of them on account of their multiplicity and on account of the unwieldiness of its application in the case of the Federal government and of the larger states; and that it would keep the people inflamed, and would be likely to array class against class, interest against interest, and sect against sect,—it would break down the idea of fixed rules of law, and would encourage the notion that power and force make right, rather than the eternal principles of justice and equity to all.

The idea of government requires that all men should be subject to the same rules of conduct under the same situations, and that no discrimination should be made in fundamental matters in favor of any particular class, but under the proposed scheme of submitting constitutional questions to popular vote, the rule of conduct, and the right of life, liberty, and property, would vary according to the possession of the necessary power to secure popular approval.

The proposed plan is not in accord with the fundamental theory of a representative government such as ours, nor is it consistent with the idea of government by fixed rules of conduct and impartial observance thereof. If carried to its extreme, it would lead to the adoption, in the conduct of the affairs of society, of the rule of the survival of the fittest and of the doctrine of main strength and brute force in the government of man. In the particular form in which it is now advanced it would be expressed through the exercise of the ballot, but it might nevertheless be an expression of power and will, and not necessarily of judgment and justice.

But aside from these objections the proposed plan is unnecessary. The decisions of the state courts and of the Federal courts upon constitutional questions are not final. The power that created the Constitution can change it. If there are rights or privileges denied to the people by the constructions of the courts upon constitutional questions, these rights and privileges can be as readily secured by an amendment of the Constitution as by any other method. The method by amendment was the one contemplated, for in all of the Constitutions provisions for their amendment are to be found. If the method of amendment thus provided is not sufficiently expeditious, it is also within the power of the people to provide a more speedy method.

If there are grants of power or restrictions contained in existing Constitutions that stand in the way of a correction of social or industrial evils, they can be modified to meet the demands of justice and equity. If selfish interests, individual or collective, could be subordinated long enough, we would soon have a solution of the problems that now confront us, and the real trouble should not be obscured by attacks upon the courts, the Constitution, and the system of government. Every change in a grant of power that may be necessary to secure to the people "life, liberty, and the pursuit of happiness" should be made; but in so doing it is not necessary to go to limits which would carry with it greater evils than those sought to be corrected.

The Judicial System the Balance Wheel of the Government.

While the judicial system created by the Constitution was described by its founders as the weakest of the three departments, and the one least likely to usurp the functions of the other departments, and least able to protect itself from attack, it has shown itself to be the most important of them all, and the one which has given stability and permanence to the government.

The wisdom of the founders was most strikingly shown by the creation of a tribunal to hold the other departments in check, and in the establishment of the Supreme Court in which, as Lord Brougham says, they reached "the very highest refinement in social polity to which any state of circumstances has ever given rise, or to which our age has ever given birth." Washington referred to the Supreme Court as the "chief pillar upon which our national government must rest," and Horace Binney called it "the great moral substitute for force in controversies between the people, the states and the Union."

With reference to the relation of the

judiciary to the scheme of government, Hamilton says that "the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."

Since the formation of the government the courts have exercised the power of declaring statutes unconstitutional whenever the representatives of the people in their legislatures or in Congress enacted measures which contravened the provisions of the Constitution and violated the rights of any citizen.

With respect to this power of the courts Hamilton says: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*" (Federalist, art. 78).

"A Constitution is, in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, *the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.*" (Federalist, art. 78).

When on February 24, 1803, Chief Justice Marshall rendered the first of a long line of decisions establishing the Supreme Court as the arbiter of the construction of the Constitution and of the validity of state and Federal statutes, the decision was attacked by the prominent statesmen of the day, but concerning this act of the court Rufus Choate said later:

"I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the legislature contrary to the Constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamantine demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind so that no demagogue not in the last stages of intoxication denies it,—this is an achievement of statesmanship, of which a thousand years may not exhaust or reveal all the good."

In order to place the judiciary upon a plane of independence so that they might fearlessly and justly interpret the Constitution, the members of the Supreme Court were given a permanency of office during good behavior and a fixed compensation, making its members removable by impeachment alone.

With respect to this feature of the Constitution giving the judges a tenure of office during good behavior, Hamilton says:

"The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the law. . . . *As nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in the Constitution, and, in a great measure, as the citadel of the public justice and the public security.*" (Federalist, art. 78).

"In a republic where fortunes are not

affluent and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench." (Federalist, art. 79).

To still further protect the judiciary from attack by the other departments of the government, a fixed compensation was provided for the judges, upon the ground, as stated by Hamilton, that "we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter," and so the Constitution provides that the judges of the United States "shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

Under this system of government it is now admitted by all fair-minded men that most of the criticism directed against the judicial system in the past was ill-founded, and in the exercise of the power to declare statutes unconstitutional and in the wise determination of questions coming before the courts, the Marshalls and Storys have had quite as much to do with the stability and permanence of the government as the Washingtons and Franklins, and the Hamiltons and Madisons.

Necessity for Preserving Respect and Confidence in the Courts.

If the respect and confidence of the people in the courts are not preserved, the force of government must necessarily suffer.

The one recourse that the weak have against the strong is the judiciary, and if the people become impressed with the notion that appeals in that direction are useless, their whole idea of government must be weakened.

The courts are the last resort of the weak and oppressed, and if the judiciary should become inefficient, partial, or corrupt, government must fail.

It is of the highest importance therefore that the courts and the members thereof should be able, competent, honest, and faithful, and that every tendency unjustly to criticize them should be discouraged.

The courts are supposed to exercise their judgment, and not their will, and where a constitutional question is involved and that judgment is honestly expressed, and the conclusion does not accord with the wishes of a majority of the voters, resort should be had to an amendment of the statute or of the Constitution to bring about the desired result.

The judiciary is bound to follow the rules laid down in the Constitution, statutes and decisions, and if changes in these rules are necessary, they should be made through the usual channels provided by the Constitution:

Lincoln says with reference to respect for the law: "Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in the colleges; let it be written in primers, spelling books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions sacrifice unceasingly upon its altars."

Reform of Procedure as a Means of Preserving Confidence in the Government.

If we are to preserve this reverence for the laws that Lincoln speaks of it is necessary, not only that the decisions of the courts should appeal to the sense of justice and equity, but that the administration of the law should be prompt and effectual.

There is no branch of the government that has it so much within its power to create a want of respect and confidence in the government as the administration of the law.

Speaking of the administration of civil and criminal justice, Hamilton says: "This, of all others, is the most powerful, most universal, and most attractive

source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, *contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.*" (Federalist, art. 17).

It is a fact that just now criticisms of the administration of the civil and criminal law are not only receiving the attention of those in public stations, but of the people themselves in every walk of life. Everywhere the complaint is heard that judicial proceedings are too technical, too cumbersome, and too protracted.

Those having differences involving small claims are sacrificing them rather than to suffer the annoyance and delay of litigation. Differences growing out of commercial relations are either being compromised by the parties, or are being adjusted by arbitration. Disputants are shunning the slow and expensive processes of the courts.

The responsibility for this state of affairs rests directly upon the legislature in those states where the procedure is regulated largely by statute, and even in those states where the procedure is controlled by the common law or by rules of court, the legislature has the power to change the procedure by statutory enactment.

But whatever the source of the procedure may be, whether or not it be the common law, a Code or court rules, the powerful influence in the community wielded by the Bench and Bar makes its members justly subject to criticism for any shortcomings in the administration of the law.

The Bench and Bar have it within their power to create a public sentiment which will compel a change in procedure, and if this power is not exercised, they must bear the responsibility of public condemnation.

The objections are not confined to any particular jurisdiction. The procedure may be better in some states than in others; but in all there is an opportunity for improvement.

A constant effort should be made toward simplification and expedition. Every useless requirement should be eliminated, every technicality should be wiped out, and every unnecessary formality should be avoided.

The substance of the right should be paramount and every detail of practice which stands in the way of doing exact justice, under the circumstances of the case, as expeditiously as possible, should be eliminated.

Responsibility of the Bench and Bar.

If the members of the Bench do not interest themselves in this matter, they may expect criticism and they will deserve it. If the members of the Bar do not take it upon themselves to remedy the defects in procedure, they may expect condemnation and they will deserve it.

But the Bench and Bar may be relied upon to work out the simplification in procedure. The profession has the reputation of being conservative, but it can only act through governmental authorities, and this process is necessarily slow.

All of the revisions of the laws and of the procedure in the courts in the past have been accomplished by the bar, accelerated, sometimes, it is true, by public opinion, but nevertheless the work was done by the members of the profession. In this respect and in many others the country owes a great debt to the profession of the law. It owes a great deal to the Bench and Bar for services rendered in the past in crystallizing the sentiment for "the unalienable rights of man," and in formulating in the Constitution the principles of liberty and union.

The preservation of the great principles of the Constitution and their enforcement through the courts are the peculiar heritage of the Bar. To the physician we entrust our bodily well-being, to the clergyman our moral character, but to the lawyer there is committed the Constitution and the laws, and all of the rights and wrongs of mankind; and it is his duty, as it is his privilege, to see to it that the instruments for the preservation of these rights and the punishment of these wrongs are adjusted to meet the needs of the times and the demands for social and industrial advancement.

It was a Jefferson who penned the immortal declaration of "life, liberty, and the pursuit of happiness;" it was a Hamilton who formulated the document guarantying these blessings to our people; it was a Marshall who expounded that instrument, and placed the new government upon a stable and lasting foundation; it was a Webster who thundered down the ages the indestructibility and indissolubility of the Union, and a Lincoln who laid down his life for a "government of the people, for the people, and by the people;" and the example of these illustrious members of the bar and that of the innumerable hosts of others who have gone before should inspire the present generation of lawyers, aided by thoughtful and patriotic citizens in other walks of life, to seek to adjust the imperishable principles of the Constitution to the pressing problems of the day, one of the first steps in which is the preservation of the judiciary upon the highest possible plane of integrity, capacity, and industry, and the adjustment of the means of enforcing rights and punishing wrongs through the courts to the requirements of the administration of justice and equity, so that we may preserve and increase the respect, confidence, and faith of the people in the government.

The Common Law System of Pleading

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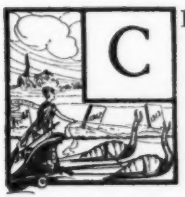

CHITTY on Pleadings was for some years, after my advent at the bar, the king-bee among law books; it was the only absolute authority in the law that I have ever known. It was to us of that generation as inviolable as the laws of the "Medes and Persians;" as sacred in all its many closely printed pages as the Koran to the most bigoted Mahomedan. Nor did I ever hear anyone question anything that was found in it. There was reason for this. If you objected to a construction put on a substantive law, you would try to put something in its place; but Chitty, with all his ingenious man-traps, was a mere artificial rubric, where everything was laid down with mathematical precision; a complicated web built wholly out of fiction, with purely arbitrary arrangement; so that if you kicked out of the traces of Chitty you had no place to go.

Special Pleaders.

One bringing a suit had to commence by running a gauntlet of technicalities. No wonder that in England every town where the courts were held (shire town) had its special pleaders, who lived and breathed only in Chitty, ready to advise practitioners and to prepare pleadings for them, stating necessary facts in legal language guaranteed to stand the closest scrutiny, or recommended as suited to mislead the opposite party, and befuddle the court. There were ten kinds of suits where there should have been only one, each one having an intricate code of its own; then there was the formidable array of pleas of many sorts, replications, rejoinders, and rebutters, running like stepping-stones over a perilous river, to the far off and mysterious surrebutter, the dim *ultima thule* of the law, the Cape Horn of the human mind, with untold dangers in ambush at every step. Under such conditions the special pleader was indeed a "sweet boon," and his services were much in demand in England. Of course, the cause of the defendant was no better, and stood in equal need of assistance. The system was the mother of delay.

I remember that in one case, when Colonel Fowler got a judgment on a note, I saw him hold it up, saying: "This is the proudest moment of my life; for this day, after six years of ardent litigation, I have got a judgment on a promissory note on which there was not even a pretense of defense."

The case had been twice to the supreme court on technical grounds, and had been reversed both times.

It was well said by Chief Justice Coleridge that a stranger in those days, observing the proceedings in the English law courts, might well conclude that courts were established not for the purpose of deciding litigated cases, but rather for the purpose of settling curious questions of pleading and practice. In the American law courts the impression made on a spectator would have been much the same. . . .

Apologies for Old System.

There were several defenses, or rather apologies, interposed for the system finally summed up by Chitty. One was

that it tended to reduce the controversy to a single issue. This was not true, as it was often decided that the plaintiff might file as many counts in his declaration, and the defendant as many pleas, as he chose; and so on to the final surrebutter. In this way pleadings became proverbially voluminous and bewildering. Then it was urged that by this system the questions involved were more clearly and distinctly presented to the jury. But that is notoriously untrue. The pleadings were full of technical words and phrases which the ordinary layman could never comprehend; and the jury depended on the instructions of the court for the real questions at issue.

Truth of Pleadings.

Chitty declared as one of his rules that all pleadings must be true; but there was nothing to enforce this rule; and it never had any existence. Pleadings were not sworn to, clients hardly ever saw them; and would not have understood them if they had seen them. It would not aid jurors in the discharge of their duties to be told that the action they were to try was one *ex delicto* or *ex contractu,* assumpsit, or trespass on the case.

A curious and decisive case came before our supreme court in Houpt v. Fullerton, 12 Ark. 399. As stated by the reporter, the suit was brought by one Pollock as counsel (he being "a singular but conscientious man," who "was a preacher and a lawyer"), on a promissory note, on which a credit of $100 was indorsed. As a lawyer he would have alleged that the whole debt was still due, as prescribed by Chitty; as a preacher he was unwilling to make a statement on the record that was palpably untrue; and so in his breach he alleged that the defendant had paid only a small part of the debt, stating the amount, and that the balance was wholly unpaid; for which he prayed judgment, which was rendered by default. The defendant took a writ of error to the supreme court. Chitty had provided no special form of breach in case of part payment; hence the court held that the declaration was not sufficient to support the judgment, which was reversed, Scott, J., saying *ore rotundo:* "The declaration in this case is radically defective both in form and substance." The court allowed the plaintiff below to file an amended declaration, denying that anything had been paid on the note, though that was palpably untrue. The result was that the plaintiff must allege a falsehood, though he might then prove the truth. The effect of the opinion was that the plaintiff must deliberately claim more than was due him, or else be denied any relief for the sum that was really due. A greater temptation to systematic falsehood could hardly be presented. Fortunately, as the reporter tells us, the conscientious lawyer died pending the appeal. Had he lived, dire must have been his dilemma.

Growth of Special Pleading.

The question arises, How and when did this involved and intricate system of special pleading arise? Curiously enough, I have never seen the slightest reference to such an inquiry during the long controversy between the advocates of the reformed procedure and the defenders of the ancient system of special pleadings, or elsewhere.

The general opinions seems to be that the system was slowly evolved by a long line of judicial decisions, just as islands have been built up in the sea by coral insects; but such an inference will not bear investigation. Nothing so comprehensive, so logical, so formal and symmetrical, was ever constructed in that random and haphazard fashion. The author was evidently an expert in all the learning of his time; a man of logical training and of unusual constructive and organizing faculties. If no one can affix the precise date of its production, the era of its composition may be read in every line. Probably no work now extant shows the handiwork of medievalism more clearly. Its date was probably a century or two before the Norman Conquest.

Influence of the Schoolmen.

As is well known, one of the vagaries of the schoolmen most insisted on was that knowledge was to be advanced most speedily by analysis; hence in their endless disputations they analyzed everything into microscopical and impalpable

dust, and soon got lost in a fog of their own creation, thinking that they were making progress when they were only marking time.

Hence it was ordained that there were to be nine different kinds of lawsuits, each having its separate code. (Assumpsit is, of course, a later addition). So enamored was the author of analysis that one of his distinctions was impracticable. If a tort was committed directly, the action was trespass; if indirectly, trespass on the case. Often it was impossible to say whether the wrong was intentional and direct, or unintentional and indirect. Sometimes it was mixed. Absurd results followed. If A sued B for carelessly permitting a dangerous dog to run at large, whereby plaintiff was bit, etc., he must sue in trespass on the case. If it turned out on the trial that defendant set the dog on plaintiff, no recovery could be had, because the action should have been in trespass. Infinite were the embarrassments growing out of this imaginary distinction.

The system exhibits all the subtlety of the scholastic methods that filled the world with a vast multitude of ponderous volumes of metaphysical discussion that now repose undisturbed in the great libraries of our centers of population, containing not a thought that has inured to the benefit of humanity.

Norman Origin of Pleading and Practice.

The learned and ingenious guide to pleading and practice culminating in Chitty on "Pleading and Practice and Parties to Actions," was French; and, like much of the blue blood of England, "came over with the Conqueror;" and it must be said that the motives on which it was based were deceitful, depraved, and dishonest.

In its completed state the original French Code of Procedure was a miracle of human ingenuity in the art of "not doing it;" being clothed in an artificial legal lingo made exceedingly difficult to decipher by reason of technical words and phrases of all sorts, and of a multitude of arbitrary characters, whose meaning was only known to the initiated; the whole resembling a costly horoscope made out by some master astrologer, not to be understood without a key and much labor and perseverance. There was no visible key to these volumes of procedure. A key would have ruined the whole plan; which was twofold,—to lessen the number of attorneys, and to make oral instruction absolutely essential to anyone aspiring to become an attorney. Such oral instruction came high; and the price could be conclusively fixed from time to time by those most interested in its imposition.

Our modern trust builders could, no doubt, have given points to these earlier experimenters in the noble art; but it must be admitted that as far as their lights extended the ancients of the dark ages showed a comprehension of the end to be attained, and of the means to be adopted, that must entitle them to a place alongside of their more illustrious successors.

It may be added that some of these volumes are still to be found in ancient libraries, preserved as literary curiosities, though there is not a man living that can read a page of them. They have fulfilled their natural and lawful destiny; they were not made to impart knowledge, but to conceal it. They are now what Charles Lamb would have called "books that are not books."

Both in France and England during the Middle Ages fees for tuition of apprentices greatly increased the revenues of practising attorneys; and the amount of the fees depended to a great degree on the extent and difficulty of the study; hence new technicalities were added from time to time. It may go without saying that when the student scraped together enough money to pay his tuition, he was buoyed up by the expectation that he would some day recoup the amount thus expended by exactions of a similar character from a later generation of applicants moved by like motives and inspired by like hopes.

In making agreements for oral instruction, inexperienced students were at a great disadvantage. You may remember that, in David Copperfield, Aunt Betsey Trotwood agreed to pay £5,000 to the firm of Spenlow & Jorkins, proctors, if they would instruct David in the mystery of becoming a proctor in admiralty, of

which sum she made a deposit of £1,000; and that, by reason of adverse circumstances, the scheme fell through; also that, owing to the obduracy of the terrible Jorkins, no part of the deposit was ever repaid; if not being so nominated in the bond.

William the Conquerer, on organizing his government in England in 1066, wisely refrained from making changes in the substantive laws in force; but as to laws of procedure in the courts the case was different. He sent over to France for his judges, attorneys, advocates, clerks, and other court officers,—a considerable multitude in number,—and proceeded to organize courts in a manner wholly new. He ordained also that all proceedings in the courts should be in the Norman-French language, a French dialect that happened to be his own native tongue. He probably supposed that by the time the English should become fit for self-government, according to French standards, Norman-French would be the only language spoken in England. So strict was the rule as to language in these extemporized courts that, if an English witness testified in one of the courts, his testimony had to be turned into Norman-French before it could be considered. Judgments continued to be entered in Latin as before, until the law was changed by statute (4 George II. chap. 26).

The original Code of the French attorneys was doubtless never translated into English until after the abolition of law-French. No one could read it save the attorneys; and they were not interested in the simplification of the law, or the popularization of a knowledge of the proceedings of the courts. Besides English was a plebeian language, the very existence of which learned men strove to ignore. Norman-French was used exclusively in English court proceedings for nearly three hundred years from the Conquest in 1066 until 1362 (36 Edw. III.) when it was ordained that henceforth they should be in English; but the Code of procedure of the French attorneys survived in England and America until lately, when, within the lives of many men still living, it was finally and forever retired to oblivion.

Origin of French Pleading and Practice.

During the long period when law-French was exclusively used in the courts, the rules, practice, and pleadings of the courts were in all things those of the French courts. What was that practice? How did it originate?

In order to find that out, we must first lift a corner of the pall that rests on all things medieval. How was the bar constituted in France? Very much the same as now. Lawyers were divided into two classes; the order of advocates, or barristers, formed one, and that of attorneys the other. The order of advocates of Paris is extremely ancient, extending beyond the historic period. No lay organization extant has such a long and such an honorable record. Of the *avoués*, or attorneys, I cannot say as much. The advocates were, and still are, supposed to grant their services gratuitously; hence they cannot sue for fees. The line of cleavage between barristers and attorneys is very distinct. The attorney attends to preparing a case for trial. He looks up witnesses, takes their testimony, makes notes on it, and finally furnishes the advocate of his client with a brief both of the law and of the facts. He is present on the trial, sitting outside the bar in token of his inferiority in rank. If any question of pleading arises it is argued by the attorneys alone. The advocates argue all other disputed matters much as in our own courts. As the attorneys are legally entitled to pay for their services, and their temptations to secure improper compensation for their labor and skill is sometimes very great, they are often accused of breach of confidence, bad faith, and other improper conduct, particularly by angry and disappointed suitors. On the stage they are frequently represented as scheming and tricky.

In the Middle Ages there was no publicity, no press, no books save in manuscript; and, of course, they were very expensive; no mails such as we know; no telegraph or telephones. To pry into the proceedings of the government or its officers was criminal. Rumors were rarely true; often circulated for fraudulent purposes. All the business of the country was in the hands of guilds, gov-

erned in secret; and these could form combinations and fix prices at will. They had their secret by-laws, enabling them to swindle and oppress the people without suspicion. What the Crown and the barons spared was gobbled by the guilds. It was an age of sordid dissimulation and dishonesty.

Two of the most important objects of the guilds was, first, to form monopolies by keeping out of their orders as many aspirants as possible. The rule for this was to diminish the numbers of apprentices by every conceivable device; only so many *per annum,* for instance; then the terms of admission were made very onerous. Everything was a mystery, even the making of shoes; and periods of apprenticeship were made unnecessarily and oppressively long and difficult; while the pay for the privilege of apprenticeship, or tuition, was generally exorbitant.

A Law Trust.

The attorneys of Paris, seeing that the rapacious guilds were flourishing under the system adopted by them at the expense of the public welfare, chose to follow in their footsteps. They therefore, with the aid of some highly skilled metaphysician of learning and ability, versed in all the controversies of the period, proceeded to form a manual of pleadings and practice for the courts, with a view to lessen competition, and to enable full-fledged attorneys to exact large fees for oral instruction to students or apprentices.

That the guilds could fix prices at will need not create surprise, since the great corporations in this country did the same thing unchecked until the passage of the Sherman act. It was supposed in France that this privilege of the guilds would build up commerce and manufactures; but owing to that singular and fatal aversion of facts to conform to theories so often displayed, the result was far otherwise. We read of forty-eight years of famine out of seventy-three years in the reigns of Hugh Capet and his two successors. These were not years of scarcity merely; they were the real thing. Many thousands perished from hunger. "Mothers ate their children, and children their parents; and human flesh was sold, with some pretense of concealment, in the markets." Famines were common. Hallam, Hist. Middle Ages, vol. 1, p. 317. Sismondi draws a picture equally gloomy. Hist. des Francais, vol. II, p. 273. The audacious plan of the attorneys to graft a "trust" on court proceedings was exceedingly reprehensible, since litigation was already so costly as to amount in many cases to a denial of justice.

Simplification is often difficult; but in this instance the task was not to simplify, but to render difficult, under the semblance of extremely scientific accuracy. The task was arduous, but it was accomplished with a degree of discrimination that must compel admiration.

In those days the order of advocates and the attorneys were allowed a very full hand in all matters relating to their professions. The rules of the courts were generally those prepared by attorneys and advocates. It may be doubtful whether any sanction of the court was required for this manual, representative of all the intellectual cunning and artifice of the period. Perhaps the courts were willing to allow the attorneys to turn an honest penny as a recompense for their unselfish labors, and their entire consecration to duty; to say nothing about their striking ability in fine distinctions. It was an age of disputation and quibbles; and here provision was made for quibbles without end. All this was before the invention of printing; but of course manuscript copies were to be had.

Effect of Special Pleading.

As the motives that led to this system of special pleading were indefensible, so its general effect was bad; it elevated form above substance, not infrequently perverting the administration of justice into a mere trial of wits; it involved useless expense, labor, and mischievous delay; it cannot be doubted that the technical spirit which it embodied overflowed into other branches of the law with bad results; it diverted the attention of attorneys, lawyers, and judges from a study of the real problems of jurisprudence, to merely fanci-

ful problems of artificial creation, having originally their sole origin in personal greed; it blinded men to the real purposes for which laws exist, and tended to lead the common people to believe, or at least suspect, that law was a mere matter of chicanery and trickery.

The Passing of the Old System.

We may wonder how a system so destitute of merit could have survived so long. But we may remember that during the Norman period it rested on authority, and hence, being thoroughly established, it needed no defense, since—

"Man yields to custom as he bows to Fate."

Besides, the rigid and logical form which it assumed gave to it a certain authoritative aspect that imposed on the mind of the reader. Though a monument of perverted ingenuity, it passed as a work of immense practical value.

We have seen how the glorious science of special pleading came to an end in England and America. It only remains to see how it came to an end in France. It fared better in the lands of its adoption than in the land of its birth.

The great Revolution of 1789 turned loose all destructive and elementary forces. The bar was too obvious a mark to be overlooked. The Order of Advocates was disbanded, its privileges annulled. Anyone might practise in any of the courts at will, as all men were equal. The attorneys succumbed also, and fell unwept, unhonored, and unsung. Napoleon re-established the Order of Advocates, cautiously reserving the power of ultimate control in his own hands. The attorneys gathered themselves together and obtained recognition, and went on as before; only they said nothing about the old manual of practice. Such a reference would have awakened unpleasant thoughts, have excited unfavorable comments. No one was interested in deciphering the old protective hieroglyphics; and so it is only of recent years that attention has been called to the illegible volumes that sleep their last sleep in the great public libraries, where they have plenty of company. *Sic transit.*

Law-French, and what came to be called "the common-law system of pleadings," both exotics, in the course of time became transformed into portentous facts. Having been so long associated with the administration of justice, they came to be considered as indispensable agencies for that purpose. It would seem that a majority of the bench and bar of England stubbornly resisted the ouster of law-French from the courts, though, transplanted into a foreign country, it had gradually become so corrupt as to be unintelligible to native Frenchmen. Lord Raymond, Chief Justice of the King's Bench, ridiculed the proposed change, saying that if the law was to be expressed in English, why not also in Welsh? Roger North took a higher stand, objecting that the law could find no suitable expression in English. A volume might be filled with similar jeremiads.

Like hostility was manifested when it came to the question of writing up the records in English. In the course of 300 years in the hands of careless and ignorant scribes, law-Latin had become a thing

"—to make Quintilian gasp and stare;"

something that neither Cicero nor Virgil would have understood, called Latin by courtesy merely. Nevertheless the proposed change was denounced as "dangerous to learned lawyers and *peace-loving* citizens."

Great was the outcry, loud the lamentation. One might have thought that the mighty god Pan had come to life again, and was dying the second time.

Hardly less strenuous was the opposition manifested here and in England to the abolition of the "common-law system of pleading." So strong was the conservative influence upon all of these issues, that it may be questioned whether, if left exclusively to the decision of the bench and bar, we might not still be using law-French and law-Latin exclusively in the common-law courts of England and America; all of which may tend to prove—what was long ago suspected—that to err is human.

Conservatism in Legal Procedure

By

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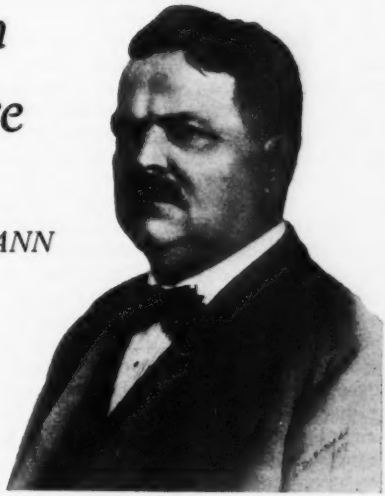


IT is fundamental in our jurisprudence that every man is presumed to know the law, and that ignorance of the law excuses no one. If it were otherwise, the rule of judgment must vary with each case, depending not upon the law itself, but upon the measure of knowledge of the law shown to be possessed by the persons involved. Such an issue would present as many difficulties as an inquest of sanity, and, if it were a necessary incident to the trial of cases, would make the administration of justice impossible to human powers. . . .

The presumption of knowledge by everybody applies not alone to the substantive law which declares the rules of human conduct, but as well to the formal law which governs the practice and procedure in cases when that conduct is brought before the courts for judgment. Everybody is presumed to know how a suit should be instituted, how prosecuted, and how defended, and how taken to and through the various appellate tribunals which may have cognizance of it,—that is, everybody is presumed to know these things except those who are specially learned therein, the lawyers who try the cases and the judges who decide them. The lawyer must be faithful to his client in the conduct of the cause, and beyond this must have not a perfect, but just a reasonable, knowledge of the law, and must show a reasonable measure of skill in the use he makes of it. He is responsible if he is disloyal, incompetent, or negligent, but not if simply mistaken. The requirement as to the judge is only that he be honest. However he may err, he cannot be held individually responsible for the consequences.

The litigant, untrained in the law and unused to its mysteries, must bear the burden of the blunders of the court and counsel, grievous as these may be. For the mistakes of the court he may have a costly and partial redress by appeal to a higher tribunal, while for the mistake of counsel he has, in the case itself, no redress at all, and outside of the case none that is greatly worth while. . . .

Abolish the Mystery of a Craft.

The law which a man is held to know should be within the reach of his understanding. The procedure to be followed in the assertion and vindication of his rights should be plainly marked out and easy to be pursued, if not by himself, at least by those who are accredited as competent to guide him. There should be

in it nothing savoring of the mystery of a craft.

The substantive law is fairly free from this reproach. On its ethical side it is brought into accord with the expanding sense of justice and the growing spirit of humanity of the people, and upon its conventional side it is made to harmonize with the needs and conveniences of business as these are developed by industrial and commercial progress, and in this work of adaptation to new standards and new conditions the bench and bar have borne an important part. But so much cannot be said for the formal law, and it is for this the lawyers are especially responsible. Here reform has moved always with a laggard step. Against every proposal of change has sounded the cry, *Nolumus mutare leges Angliæ*. From the beginning there has been strenuous insistence upon the existing methods, and even when the old order changed, giving way to the new, the spirit of the old seemed yet to pervade the new.

Persistence of Norman Influence.

It is not strange that with the Norman conquest the Norman language should come into use in the English courts, but it is passing strange, when we consider the nature of that conquest, and how soon the alien race was absorbed by the native, that this should have continued so long. For three hundred years, long after English was the language of every-day life among all classes of people, French remained the language of the profession, and when it was discontinued it was not for the convenience of litigants, but, if we may credit Blackstone, for the vainglorious reason that Edward III., having subdued the Crown of France, it was "unbeseeming the dignity of the victors to use any longer the language of a vanquished country." And the change made was but a limited one. The language spoken in the courts was English, but the pleading, whatever was put in writing and placed on record, was done in bad Latin, while the reports of adjudicated cases made by the lawyers for the use of the profession continued to be in Norman French. And so it was until the time of the Commonwealth, when the Latin was banished from the records and the French from the reports, not, however, without great regret on the part of many lawyers. Styles, in his preface, says: "I have made these reports speak English, not that I believe they will be thereby more generally useful, for I have been always and yet am of opinion that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others, than to defend themselves; but I have done it in obedience to authority and to stop the mouths of such of this English age who, though they be confessedly different in their minds and judgments as the builders of Babel were in their language, yet do think it vain, if not impious, to speak and understand more than their mother tongue."

He thought it dangerous that men should really know what they were presumed to know, and so many were of his opinion that with the restoration of the Stuarts the Latin was restored to the courts and continued in use for the pleadings and records in all cases, civil and criminal, until the year 1730, when by act of Parliament English was again made the language of the courts for every purpose, and for the sensible reason "that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and the pleadings, the judgments and entries in a cause." Even at that day so simple a reform could not be effected without opposition. Raymond, Chief Justice of the King's Bench, led in the fight against it, and could see nothing but evil to result from the innovation. A generation after, Blackstone, in his Commentaries, regretted the change, and Ellenborough, in a still later day, preferred the use of a language which had never been the vernacular of any people, to his own English, dignified as it had been in verse and in prose by the genius of Spenser, Shakespeare, Milton, Dryden, Pope, Addison, and Swift.

An alien tongue thus persisted in the English courts for nearly seven hundred years, and alien forms persisted for more than a century longer. What we know

as the common-law system of pleading exhibits the genius of the Norman, rather than of the Saxon, element in the English nation; but it held its place with astonishing tenacity, succeeding in, what the Latin of the court records had not done, establishing itself in the English colonies and hindering there the administration of justice as much as at home. As it developed, it was formalism run mad. . . .

Until the middle of the last century, within the memory of living men, this archaic procedure held its place wherever the jurisprudence of Westminster had sway, and it may be found still in force in one of the leading states of the Union, relieved, it may be, by some of its worst features. Take up Chitty's Pleading and Tidd's Practice, read the dreary casuistry you find in their pages, and bear in mind that it remained until our day as an obstruction in the way of justice. The niceties and subtleties of the law of pleading were all settled at the expense of some suitor who cared nothing, and should be held to care nothing, for the forms employed, but who had a grievance and was entitled to a remedy, and as at the trial he could tell his case from the witness stand in plain English, so it should have been formulated by his counsel for trial in plain English in the pleading. . . .

Simplification of Pleading.

For his constant and untiring efforts to this end, and for the large measure of success achieved, the country and the profession are greatly indebted to David Dudley Field. But Field himself felt that his work was far from completed. The changes he introduced were not heartily received, and, as before, the old wine was poured into the new bottles. The Code, it was held, was in derogation of the common law, and it must be strictly construed; and this in face of the fact that the purpose of the Code was to cut up the common law of pleading, root and branch. It was not sufficient to state facts, as the Code contemplated, but there must be a theory of the case, and a mistake as to this was fatal. The spirit of the old formalism survived, and the shades of debt and detinue, trover and trespass, were constantly invoked and haunted the courts with their ghostly presence. Students in our law schools are still taught that they cannot plead properly in the new way if they have not mastered the old, and so to fit them for making a concise statement of facts in plain English they are commended to the fantastic forms and tragic absurdities of Chitty and Tidd, rather than to the rudiments of English grammar and the simple diction of the English Bible.

Office of Pleadings.

The purpose in pleading should not be to display expertness in the art, but to advise the court and the opposing party of the contention made. The controversy in the interest of justice should be narrowed as much as may be, but not necessarily to a single issue, for there may be more than one matter really at issue between the parties. Falsehood should be eliminated as well as formalism. We require the sanction of an oath or affirmation in behalf of testimony, and we should require the same solemn sanction for the pleadings. As the practice now stands in many of the states, litigants are put to the burden and expense of proving facts which would not be denied if the denial were required to be under oath. In nearly every case where a general denial is interposed it is in greatest part untrue. . . .

Appellate Procedure.

Where the appeal of a case is allowed it should be facilitated in every possible way, but in nearly every state we find an accumulating body of law upon the subject of appellate procedure. At the same time complaint is made by the judges that the records presented are largely encumbered with useless matter. But the fact should occasion no surprise. Elaborate records are a necessary consequence of intricate procedure. When there is doubt whether something shall be done in one way or another, it is, if possible, done in both ways. If there is any question whether something should be included in the record or may be excluded, it is included. With us appeals are sometimes dismissed because it does not appear from the record in the appellate

court that something was done in the trial court, notwithstanding it was in fact done. . . .

Our practice is too much beset with requirements which, complied with, serve no good purpose whatever, but the omission of which is fatal to the case, and as long as this continues there will be much useless labor imposed alike upon counsel and the court. If records are to be reduced in volume, the process of elimination must not be a dangerous one, and form must be dealt with as form, and the punishment in case of offense against it should be made to fit the crime. It is a worse than Draconian Code which punishes the client capitally for the misdemeanor of his counsel.

When a case has been safely conducted through the devious course of appellate procedure, the old spirit asserts itself in the manner in which it is reviewed. It is not sufficient to sustain the judgment that it is right, but there may be no error in any of the proceedings leading up to it. We profess great respect for the verdicts of juries, and under guise of this respect set them aside for the most trivial causes.

The English Method.

They have advanced far beyond us in England. In 1873 the different courts of common law and chancery were made one court, consisting of two divisions, the high court of justice, which had original jurisdiction, and the court of appeal, which had appellate jurisdiction. All mere details of practice were left to be governed by rules of court, and violation or neglect of these was subject to discipline in any case as the court thought appropriate. There is therefore an elasticity and adaptability in the procedure to the requirements of each case which is entirely wanting when the rules are prescribed by inflexible legislative enactments, failure to observe which is fatal to the case itself. Form being subordinated to substance, the tendency is continually toward greater simplicity. Pleadings are short and to the point, and in many cases are dispensed with altogether. Preliminary hearings determine whether there is a bona fide controversy, eliminate all questions of form, settle the issues, whether of law or fact, fix the time and mode of trial, and the case when tried is tried entirely upon its merits. Dilatory tactics and sham defenses are well-nigh impossible under this system, and real controversies are disposed of without unnecessary delay and without unnecessary expense.

The procedure on appeal is as simple. There is no transfer of the case from one court to another, for the trial division and the appellate division are constituent parts of one and the same tribunal. All appeals are in the nature of rehearings, and are brought by notice of motion in a summary way, and no petition, case, or formal proceeding other than the notice of motion is necessary. . . .

Criminal Procedure.

Our criminal procedure is in a worse state than the civil.

The extreme technicality of the judges of the early days is often attributed to the severity of the criminal law which punished with death many offenses now dealt with as petty misdemeanors. Prisoners were also denied the right to counsel, and were not permitted to call witnesses in their own behalf. But the sympathy of the judges does not fully explain this technicality. Something was due to that same love of casuistry which displayed itself in the forms of civil pleading. No indictments were more technically considered than those for murder. . . .

While humanity no longer calls for these refinements, formalism does, and so we abandon the old precedents grudgingly and reluctantly, and indeed hold on to as much of them as we can in spite of statutes which provide that indictments shall not be held invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. . . .

The provisions of our Constitution securing a fair trial to the accused do none of them sanction the technicalities of the ancient law. Prosecution must be by indictment or information, and as to the form of these, the sole provision is that the accused may "demand the nature and cause of the accusation." The trial must

be speedy and public, and by an impartial jury of the county. The accused may appear and defend in person and by counsel, have process for witnesses, cannot be compelled to testify against himself, and may not twice be put in jeopardy for the same offense, and he must be admitted to bail except in capital cases, where the proof is evident or the presumption great. In all other respects the pleading and procedure are left within legislative control.

In every other field of human endeavor the fault which is obviously a mere slip of the pen may be corrected by a stroke of the pen. In the law, and especially in the criminal law, the fault is fatal, everything is vitiated, and we must begin at the beginning, unless indeed, as sometimes happens, even that cumbersome remedy is precluded. Legislative attempts to remedy this condition have not been wanting. Statutes of jeofails have been enacted providing that mere technical or formal defects in pleadings and proceedings shall be disregarded. But we flout the legislative attempt at reform, and render it nugatory by construction. We hark back to the ancient use, and hold everything to be material which it held to be so. . . .

Human Interests Paramount.

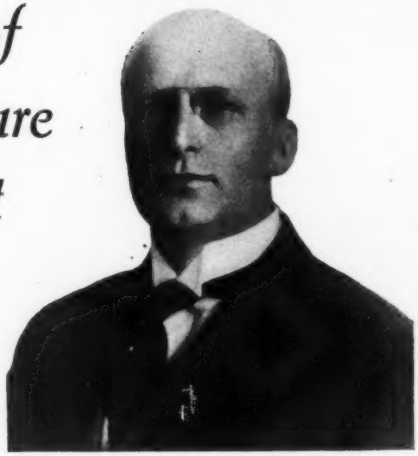
It is the vice of the old systems of procedure that their rules are paramount to the human interests affected by them. The means became exalted above the ends they were intended to serve. Some form and some order we must have, but these must be suited to the case, and not the case to them. The justice of the law should be manifest in all its judgments, and for this its ways must be plain to the general intelligence. We resent criticism of legal methods from the outside, but there are manifestations of discontent with our procedure more significant than any mere criticism, whether temperate or intemperate. People are disposed to hold themselves aloof from the courts, settling their controversies otherwise, and too often when grave crimes have been committed they take upon themselves the function of vindictive justice, and in hot blood and blind passion inflict the punishment, which should be inflicted, if at all, only after deliberate and dispassionate inquiry.

Compromise is becoming the order of the day, or if compromise fails, arbitration. Institutions, like boards of trade, have their committees of arbitration; important contracts provide for it in case of differences between the parties. Compromise and arbitration may be improvements upon the methods of the law as they are, but not upon its methods as they should be. Compromise is commendable when it means the recognition of another's right, but not when it means the surrender of one's own right. The business man of to-day feels that he cannot afford to litigate. It takes too much time, it costs too much money, it fails often to settle the matter in dispute. So a compromise is made not from moral, but from mere pecuniary, motives. Wrongful demands are conceded if the measure of extortion does not too far exceed the expense of a law suit. . . .

The Duty of the Bar.

Ours is a government of law, administered largely by lawyers. They have not only engrossed the judiciary, but have dominated in the legislative halls and in the higher executive offices. They have been the leaders of public opinion and foremost in shaping public action. The constitutions of the states and the United States, the enactments of Congress and the legislatures, are their handiwork. Of their record in the political history of the country, they have no occasion to be ashamed. But they, like all others, find self-discipline a difficult task, and are reluctant to attempt a reform of their own methods. They very naturally cherish the knowledge of their craft and the methods which they have acquired the skill to use. But change must come, and lawyers are best fitted by their experience to bring it about. They see the defects and know the remedy. They inaugurated the work sixty years ago, and they should lead in the efforts for its completion.

The Relation of Judicial Procedure to Government



BY THOMAS W. SHELTON

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UDICIAL procedure has been the cause of more discussion and dissention, and is prolific of more dissatisfaction in governmental relations, than any other one subject, except religion. This is because it is the most vital. History is silent regarding the procedure in the trial of Cain, but in Ecclesiastes, 8:11, there is most faithfully commemorated the protest of the ancient Hebrews: "Because sentence against evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil." The Medes and Persians appear to have made it a little unfortunate for one to question the immutability of their laws, and so did the administrators of the Roman Republic with its Twelve Tables. In them we are not interested, however, since their governmental policies would hardly be welcomed by the ideal American Republic. But the habit was again acquired under the Caesars, and grew in profusion and boldness until the days of the Emperor Valentinian III., who ordered that the opinions of no one should be considered except those of five citizens named by himself,—and then only when the special committee was unanimous. The great Justinian Code that required one hundred years in its making will forever be the distinguishing feature of the first half of the sixth century of the Christian era. Napoleon boasted that when his famous battles were forgotten, his Code would perpetuate his memory. Wars are temporary, but judicial procedure is like the poor. Associated with English law and procedure are the immortal inns of court, organized for its study and consideration. When Lord Shelburne and his associates perfected for England her present model system, there ended eight centuries of controversy, and a new era was born to the world of jurisprudence. It was adopted in 1873 and has undergone the necessary amendments evidenced by experience. The struggle at last seems to be over. There is not now, nor was there ever, a system to compare with it in form or result. He did not, like Moses, seem to have found it; nor, like Mr. Field, to have invented a system. It is an evolution of the great common law of England modified to suit the times and the result of the mature reason of centuries. It is simple, economical, and expeditious, and is so designed as to develop and present and perpetuate the precise point in dispute upon the record itself, and no other, and without requiring any action on the part of the court for the purpose. Parliament promptly sanctioned it, and the supreme court of judicature put it into

effect with all necessary rules of practice. Some of these days Congress will put its political ear to the ground, stop its patchwork policy, and follow a good example. Congressman Reuben O. Moon, of Pennsylvania, has already set an example in his "Judiciary Bill." Will he make himself the benefactor of mankind by completing the reform of judicial procedure by simplifying pleading and procedure and impeachment? A waning of popular confidence must be strengthened.

Difficulties Peculiar to Procedure.

Since judicial procedure is dealt with by specialists, the view of it is naturally personal. Unlike the substantive law, where men differ in groups and even in political parties, almost every thoughtful lawyer has an inchoate, individual idea gradually progressing into a plan which, in the fullness of time, *Deus volenti,* will be offered as a remedy. Therein they do not materially differ from men suffering from physical ailments. Everybody admits that procedure is unnecessarily cumbersome and expensive; that reform and uniformity is needed and must be brought about. Half of one's time is lost in wondering why it is not done. One reason, I venture to say, has been given.

The situation of the lawyers at present is very much like that of a group of workmen that dug into a swarm of hornets,—it is every man for himself and the devil take the work. Lawyers are too busy avoiding the sting of technicalities of pleading to obliterate the source of the evil, for some time must be given to the study of substantive law. The first thing in mind upon entering a case is the pleading and procedure, and it is also the last, without any intermission in the meantime. Practically, it is like crossing an out of date bridge in bad repair and with patched up decking. The burden bearer must minimize his load in order to apply his energy to getting over the pitfalls in the defective way. His skill, strength, and speed serve him and his employer little purpose. The bridge ought to be destroyed and a modern complete viaduct erected suitable to the times and the traffic.

Courts not Entirely at Fault.

The great Chief Justice himself could not make satisfactory progress under present judicial procedure. Lawyers and legislatures and Congress and commerce and society must take the beam out of their own eye before their criticism of the courts can be equitably heard. As a lawyer, I lay the chief blame at the door of the profession. Once accustomed to a system, to lawyers, it becomes a fetish. Their one answer to the call of reform is: "We are accustomed to the system in vogue" or, "we can't agree on one;" or, "Congress cannot trust the Supreme Court." And, we keep on patching. I challenge the legal fraternity to bring up from the bottom of their hearts a different answer, and to deny that the responsibility is theirs. Commerce and society, in necessary ignorance of what to do, is growing restless and impatient, and unless there be relief and speedy relief it portends evil. By his works, a lawyer should evidence a keen perception of his duty as an officer of the court and so participate in its machinery as to nurture that public confidence necessary to the usefulness of the courts. Commerce and society would rush to their standard if they would raise a standard and unite under it. The loyalty of the great mass of the people, when convinced of the good intentions of government, is one of the most indestructible, comforting, and dependable things next to religion. I had rather possess the abiding faith of a people, than all the wealth of Rockefeller and Morgan. But, if the lawyers do not agree and lead the way how can Congress and the people be expected to follow.

The Trinity Supporting Courts.

Tried and proved honesty has become to be the greatest political asset in the United States. This exception to what ought to be a rule does not reflect a healthful state of the public mind. Restlessness is running away with better judgment. Courts draw their power and have their being in the faith and confidence of men, and not by virtue of constitutions and statutes. Judicial procedure is made possible by the trinity of

respect, faith, and obedience. Weaken any one of them, and their usefulness is impaired; totally destroy any one of them, and the Republic will fall. Of the trinity of which the Federal government is composed, the administrative and legislative could not survive without the judiciary. With faith in the judiciary, the other two can create but temporary apprehension. How hopefully do we turn to the courts as a city of refuge from all evil. And it is our last hope.

An outspoken impatience if not severe condemnation, then, is well justified in the contemplation of efforts to undermine popular faith and trust in the courts and the Federal Supreme Court in particular. The founders of the government placed the Supreme Court beyond the influence of its two co-ordinate branches. Under the Federal plan it is the burden bearer, for it is the guardian of the Constitution of the United States, their treaties and their laws. Congress can enact and the Chief Executive may approve, but the act must square with the Constitution that the court must read into it. The law, therefore, is found in the decisions, and it is thereby made certain, permanent, and uniform—a fixture resting upon eternal principle. The very structure of interstate relations is the evolution of wise judicial decisions, and not statutes. It is the foundation of the reputation of John Marshall. And I make bold to predict that the interpretation of a new interstate industrial era is going to prove the foundation of other great judicial reputations. The country is moving on behind its faithful guardian, and it is moving on in the middle of the road laid out for it by its founders. Times, and the manner of doing things may change, but principles live forever. That is the secret of the strength of this Republic. No storm can sway it from its course, for there is a pilot at the helm. The Supreme Court has nurtured the nation in its infancy, trained it in its youth, and is now guiding it in the straight and narrow way in its maturity. It has been to the nation a pillar of fire by night; it has guided destructive revolutionary doctrines into beneficial evolutions; the violence of anarchy and the persuasiveness of the demagogue have fitted themselves into the constitutional mold; the oppression of concentrated power and the chicanery of corrupt organization have ceased to trouble and alarm, at its simple word. It is the final arbiter between man and his brother, the state and the church, the citizen and the soldier, and even between Congress and the Chief Executive himself. Who will measure the debt of the country to its courts?

Necessarily, then, the courts reflect the very genius of government itself. And, as has been said on another occasion, there abides in the people of this country a sublime faith in their highest tribunal, and in most all of their courts, that makes of submission the noblest attribute of national character. This faith is the corner stone upon which rests the very existence of the Republic. It is as beautiful as filial bondage, and stronger than the duress of arms. Presently, it is an isolated case where the law is not allowed to take its course.

A Profound Duty.

Believing these things, is there a more patriotic duty in the noble profession of the law than the profound obligation to encourage, foster, and make justifiable that faith in the judiciary of this country that is the very breath of its life? With that thought, let us make an intimate and analytical view of the courts as a machine for administering the law.

Analysis.

Judicial procedure, as was said on another occasion, is composed of the judge, the man, with his power and mode of reasoning—the procedure in his court, with the written pleadings, rules, precedents, and traditions that restrict and confine his individuality, limit his personal power, and make of him the true impersonation of the blind Goddess of Justice. Like a complete machine, each part has its important function. First, let us consider the man.

The Measure of a Judge.

Fortunately, unsuitable men are so seldom found that they serve but to prove the general rule. I am firmly of the conviction that of the trinity of evils that

make bad judges—*corruption, ignorance,* and *subserviency*—the worst of these is subserviency. The stench of corruption eventually reveals its presence; the blunders of ignorance are awkwardly visible to both parties to the record; but the stealth of favoritism is apparent only to the expert professional eyes of unwilling witnesses. Few lawyers can afford to and all regretfully perform the patriotic duty of pointing out the occasional unfit judge. Americans dearly love to admire and respect their faithful official servants. I wish to emphasize that judges should be men who, now, and always have understood and lived up to their country's best traditions; who draw their inspirations as a matter of right from the firesides of the representative people, and not from the influence of or respect for their high office, and with whom "thrift will not follow fawning." No man with political debts to pay, enemies to punish, friends to favor, or dependents to be supported out of the assets of litigants, is fit to be a judge.

Statutory Morals.

Let us turn from this high standard, and consider some rules of conduct that Congress has thought necessary in order to hedge about and regulate the conscience and discretion of the Federal judges whose appointments the Senate has approved. Under 29 Stat. at L. 184, it is solemnly provided that no marshal or deputy marshal, attorney or assistant district attorney, jury commissioner, clerk of marshal; no bailiff, crier, juror, janitor of building, nor any civil or military employee of the government; and no clerk or employee of any United States justice or judge shall be appointed United States commissioner or receiver of the court. But the amazing precaution is § 7 of 25 Stat. at L. 437:

"That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member."

What sort of a commentary is this upon the *personnel* of Federal judges? Are there many, or just two or three men whose sense of duty needs to be statutory? How did they become judges, and how do they remain so? For the sake of the respect the bar bears to the great men who honor the bench in the highest and purest service to their country, let these malefactors, if any there be, be swept from the bench they dishonor, and these statutes erased from the memory of the men they insult. A judge who has to be legislated into a proper selection of receivers, or any other official or personal act, is unfit to appoint custodians to administer the assets of litigants or fix their compensation. Such a man would do indirectly what he is forbidden to do directly. Statutes do not make morals. A judge ought to and must be like Caesar's wife. If Congress has not faith in its own appointees, by what course of reasoning does it reach the conclusion that the people will have any? A statutory guardianship is the very antithesis of high ethical standards and is suggestive of a suspicion that has no place in jurisprudence. Life tenure is to be as much approved as the "recall" is to be disapproved, but there ought to be a simpler, cheaper, more direct, and more certain way of preferring and answering charges concerning judicial conduct. Impeachment should be made to fit the crime, instead of being the plaything of politics, and it should not be the only way of bringing a life tenure judge to judgment.

"Judicial Courts Martial."

I would suggest that a tribunal and procedure be provided for the trial of complaints and charges against judges, the prototype of which may be found in military courts martial. Let the court be selected by the Chief Executive or the Chief Justice from amongst presiding judges of equal or superior dignity and of different jurisdictions, who could in no way profit or be effected by the outcome of the trial. Let charges or complaints and specifications be prepared and served in advance, and let the accused be required to appear in court in person at a public hearing. Before such a

court there could be defined and considered the trinity of evils,—corruption, ignorance, and subserviency,—for conduct could be analyzed and motives exposed. Such a tribunal the people would trust, and would be all sufficient, because the judge is brought within their reach. The chances are that such a Federal plan would be adopted by the states when its merit was once evidenced. It would do more towards elevating and maintaining judicial and legal standards, and reviving the necessary spontaneous popular admiration and respect for the courts, than any other possible precaution that could be taken. It would do more than any other agency towards subduing the demand for the dangerous expediency of the "recall of judges." This demand can nearly always be traced directly to some improper personal judicial conduct that could not be or has not been reached by impeachment. The present attitude seems to be, if the machinery of the law will not allow us to reach a judge, then we will fix it so he can be recalled. Congress, by refusing to impeach in proper cases, sowed the wind, and is now reaping the whirlwind. Dissatisfaction with judges is not the outgrowth of honest decisions or big matters, because the average man is a good loser when he has had a fair chance, but it is on account of the aggregation of little things of which the press never hears and under which the complainant chafes in helpless impotency. And it should be remembered that the people only see results, not being familiar with court procedure. They do not understand that the means used are contrary to both morals and ethics, and are secretly despised by an outraged but helpless bar, and so they condemn all judicial procedure. Once it is known that there is a tribunal before and a manner in which both complaints and charges may be preferred, the matter will become personal to and at the command of every citizen and lawyer as well. I repeat that this, in my humble opinion, is the one thing that will defeat the present demand for the dangerous expediency of the recall of judges, which is almost certain unless some more appropriate remedy be put into effect.

Pleading and Procedure.

To the procedure of the court that hedges about the power of the man, then, should be given the profoundest unselfish consideration. The substantive law, as it is administered to society and commerce is as it filters through these instrumentalities of justice. It is self-evident that the potency and dignity of the law is measured by the machinery of the courts. Judicial procedure is to the substantive law what the arteries are to the human body. It is an adage in medical diagnosis that a man is as old and as useful as his arteries. It is a truth in jurisprudence that a law is as good as the procedure through which it is enforced. It matters not how much good rich, pure blood one may have pulsating in his heart, if the arteries through which it must be distributed to the human system are clogged or inefficient, and fail to perform their function. Almost imperceptibly there comes the certain death. So legislatures and the Congress may fill the statute books with the wisest of laws, but their usefulness and force will be measured and limited by the judicial procedure through which they are administered. In urging upon legislative bodies the reform of pleading and procedure, it has been endeavored to impress them with the fatal fact that the enactment of substantive law is a secondary matter in comparison. It matters not how good a law is, or what might have been its beneficent purpose, or the evil desired to be eradicated, it becomes bad if not vicious, if improperly or inadequately enforced. And, without wishing to become an alarmist, so surely as the human heart connected with clogged arteries must eventually cease to beat, so certainly will a government retarded by clogged judicial procedure surely decay. The "recall of judges" and "judicial opinions," like grim spectres, are symtomatic of the first retrogression. Of the trinity of respect, faith, and obedience supporting the courts, the greatest of these is faith. First will be the "recall," but eventually it will be abandonment. When men turn from the courts they for a time arbitrate and then they fight. Judicial procedure is the great divide between anarchy and law and order, and

the distance between them is not so great that the rattle of musketry has not occasionally betrayed the unwelcome visitor. Rome, in her glory, measured her strength by her courts, they were models for the world. But, when the will of the Prince became the law of the land through the instrumentality of subservient and dependent courts, bound by a loose standard of procedure, the decadence of the Imperial Empire began. When the passing whim of the populace become the law of the land, in the same manner, the decadence of the American Republic will begin. Man, though it be the people themselves, will have been exalted above the law, and the courts will faithfully reflect the genius of the government. On the other hand, England may trace the elements of her greatness in Magna Charta. "The courts no longer followed the person of the King; but they were held in certain places." No judge could be appointed "excepting such as knew the laws of the land and were well disposed to observe them." In the courts lay her power; in reverence she found her strength, and the people their contentment and happiness. From the schools of her common-law procedure have graduated the legal giants of history. From her inns of court came forth a body of law and a citizenship by whose example we well may profit. The people were required to fit the law, and not the law the people!

Who Shall Prepare It?

But who shall perform the important duty of preparing a system of pleading and procedure for the law side of the Federal courts? There is but one answer—the United States Supreme Court, with such assistance from the bar as shall be indicated as being of service. We may look to legislative participation for disappointment in result, expedition, and permanency. It is desired to repeat that, with all due respect for the many, earnest, honest, and well-equipped men who compose those bodies, they suffer from the same trouble as the lawyers,—failure to agree. In want of preparedness, dissimilarity, and conflict of idea and indifference, there is much to be feared, the greatest evil being the power and habit of amendment. Politics have no respectable place in jurisprudence. Congress should delegate to the Supreme Court the power, as it long since has done on the equity side, make it mandatory and stop there. It is believed that the states would gradually adopt the system, and thus we would have a much desired uniformity. That would be an additional blessing. Nothing but the solemn voice of this great source of justice will bring the bar of the country and Congress to a point of complete acquiescence and forceful support. Laymen can have no hand in it.

What Shall be the Form?

Now, what shall be the form that pleading and procedure shall take? Let it be that which the Supreme Court shall provide. We have not trusted it in vain in matters of equal importance. That learned, experienced, and patriotic tribunal will not be unmindful of the fundamental principles that limit and define personal power. Man will not be exalted above the law, for the law would be meaningless if enforced without regard to fixed rules of procedure. It would be worse than meaningless if left to unfettered individual inclination. As was said on another occasion, with strict reference only to enforcing rules of pleading and procedure, the relation of the presiding judge to the litigants and the government is analogous to that of an umpire in a game. It is his province to administer, not to make rules. He would be a dangerous umpire who made his rules or changed existing ones to suit personal views as he enforced them, but a very just one who enforced existing rules regardless of his personal inclinations or the *personnel* of the players. It is not a question of honesty, but one of natural human limitations. Gratitude, a cardinal virtue, may become in a judge, a vicious weakness.

History but repeats itself in the contention of some people for unlimited power in judges,—that they should not be confined to the decision of the distinct issue, made up and perpetuated in a written record. The framers of the Constitution met and peremptorily dealt with that same uncanny confidence in a per-

sonal *ego,* rather than a fixed system. The answer was the adoption of the 10th Amendment to the Constitution, specifically reserving to the states all power not expressly or by necessary implication granted to the Federal government. The words of Thomas Jefferson in that memorable debate will die only when republican institutions shall be no more and personal liberty become a jest.

"In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

And, so it is suggested to those lawyers who would abolish all form of pleading and procedure; who would make of decisions the caprice of an individual, and *who would make the administration of justice the accident of the judge, instead of the certainty of the system,* to live a little more in the fragrant memory of the constructive statesmen and soldiers who gave them their government. The very evolution of pleading and procedure is the history of the resistance of mankind to tyranny and usurpation.

Preserve the Principles.

It is immaterial what form the system takes so that, at the trial, a statement of the facts of the cause of action from which the alleged legal liability can be drawn is presented upon a permanent record. It is neither honest nor prudent that that which is not presented in the pleadings originally or by just amendments should be judicially decided. A man has the constitutional right to be confronted by his accusers, and to be placed but once in jeopardy upon a clearly defined charge; so, he has the inalienable right to be explicitly notified of the *intention, specific reason, and alleged legal right to take his property.* Civil rights are important, but they are founded upon property rights. The case at bar, before the trial begins, should be a thing complete within itself, independent of the court, not only for present but for future record. Furthermore, preparing and answering the pleadings is a lawyer's function. For the court to prepare or properly amend a pleading, of his own volition, he must know the litigant's case and must advise the proper theory to adopt. He must, therefore, consult the clients and interview the witnesses. Having arranged the issues to suit himself, he ought to find no trouble in deciding it the same way.

Technically stated and following eminent authority, the parties by their attorneys should make the record, and what is decided within the issue thus made is *res judicata;* anything beyond is *coram non judice* and void. The courts should not *ex moru motu* set themselves in motion, nor act *sua sponte* except to prevent imposition upon its own jurisdiction. Under such a system, the acts of the tyrant or the irresponsible become *obiter dicta* and harmless. On appeal the immateriality and irrelevancy of the evidence and error of decision or any procedure are self-evident. It is next to impossible for error not to be overtaken.

Two Resolutions.

Having these thoughts in mind, there was offered at the 1910 meeting of the American Bar Association, this resolution:

"Resolved, That in whatever form of pleading that may be adopted, there shall be preserved the common-law limitation upon the court, that whatever is not juridically presented cannot be judicially determined."

At the 1911 meeting there was offered a resolution calling upon Congress to repeal § 914 of the Revised Statutes, and enact such laws in lieu thereof as will authorize the Supreme Court to prepare and put into effect a complete correlated system of pleading, with all necessary rules of procedure and practice. That has been referred to an appropriate committee. If Congress prefers following the example of Parliament and enact *the form,* that would be a happy compromise and a long step forward. For forms of pleading let the theorists contend; that which will best preserve the genius of the government is best.

Procedural Reform

BY EVERETT P. WHEELER
of the New York Bar

IT is a fundamental element in the American system that controversies between man and man should be determined by courts, and not by force of arms. That indeed distinguishes civilization from barbarism. It follows that the action of the courts in bringing these controversies to a hearing should be such that they can be decided upon the merits, and as speedily as possible. A delay of justice is often a denial of justice, and it is obvious that when a case is decided not upon the merits, but upon some technical point that does not affect the merits, the decision is unjust.

It is related of a Philadelphia judge that when he was charged with rendering an unjust decision, he replied: "It is my business to decide cases according to law, and not according to justice." If he meant that the law compelled him to decide cases unjustly, he brought a formidable charge against the law. If he meant, on the other hand, that he was bound to administer the law, and not apply his own unaided conceptions of what justice might require, there might be some justification for the statement.

But it cannot be denied that there are many among our people who believe that the former interpretation of this judge's remark is the correct one, and that the methods of administering the law in this country often fail to do justice. For example, when the Missouri supreme court decided[1] that a man whose guilt was proved, according to their own statement, by ample evidence, must yet be dismissed because the word "the" was omitted in the clause of the indictment which should have said that the crime was committed "against the peace and dignity of the state of Missouri," it is obvious that justice was not done, and that peaceable citizens who desire protection against the assaults of criminals had just cause to complain of the law as declared by the court.

These complaints to which reference has been had, are undoubtedly increasing. They have led to attacks upon the courts which have often been unreasonable. Nevertheless these attacks deserve attention because they express the popular conviction of injustice. Our true policy under such circumstances is expressed in the words of the great Italian statesman, Cavour:

"I am not an alarmist; nevertheless, without being one, I think we can see at least the possibility, if not the probability, of stormy times. Well, gentlemen, if you wish to take precautions against these stormy times, do you know the best way? It is to push reform in quiet times, to reform abuses when these are not forced upon you by the extremists."

Appellate Procedure.

The most serious defect in the practice in the Code states is that upon appeals. These appeals are often decided upon the ground that a mistake made by the trial justice in a ruling upon evidence or in a refusal to charge was erroneous, and that it must be presumed that this error was prejudicial to the appellant, and caused a verdict or decision to be made which would not have been made otherwise.

The rule on this subject which has prevailed since 1835, was adopted in that year by the English court of exchequer.[2]

[1] State v. Campbell, 210 Mo. 202, 234, 109 S. W. 706, 14 A. & E. Ann. Cas. 403.

[2] Crease v. Barrett, 1 Cromp. M. & R. 919, 932. The part that Baron Parke took in adopting and enforcing this rule justified Goldwin Smith's sarcastic epitaph: *Ingenio magno, immensa doctrina, acumine mentis subtilissimo leges Angliæ feliciter ad absurdum reduxit.* He did, indeed, reduce the laws of England to an absurdity.

It is thus stated by Lord Chief Justice Coleridge in 1887:[3]

"Until the passing of the judicature acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial."

Presumption against Prejudicial Error.

The presumption should be that the decision below was right, and that if it was erroneous in some detail, the error did not affect the result.

Perhaps no better argument can be stated for this proposition than a passage in the opinion of Mr. Justice Martin, of the court of appeals of New York. It expresses the great embarrassment that lawyers feel in the trial of important cases. In Lewis v. Long Island R. Co. 162 N. Y. 52, 67, 56 N. E. 548, the judge delivering the opinion of the court says:

"After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial, we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his rulings. When the number and variety of the questions raised are considered, we are surprised not that a single error was committed, but that there were not many more."

In other words, our procedure is such that it is impossible, even with a judge of "almost unerring correctness," to get a verdict on the trial of an intricate cause that will stand the test of an appeal. It needs no argument to show that such procedure needs revision. The state of New York within a few years created a commission to inquire into the causes of the law's delay. Several judges of the supreme court of that state were examined before the Commission. Presiding Justice Hirschberg said, in the course of his examination:

"I think that one great difficulty is that our system is distinctively an appellate system, and it is based upon the fundamental idea that a trial and a decision are always wrong; the result of it is that people indulge in litigation because the opportunities are great; they are sure of two appeals, and until the final decision is made they are in no hazard. (Law's Delay Commission Report, p. 269.)

"I have always thought it was a fatal feature of our judiciary system . . . the idea that if a man tries a suit and loses, he can appeal on the assumption that that was wrong, instead of appealing on the assumption that it was right. (Id., p. 270.)

Mr. Justice Scott agrees with this view:

"Mr. Hayes. Have you any suggestion to make on appellate procedure?

"Judge Scott. You should change that rule of presumption. In the first place I think the appellant should have cast upon him the burden of establishing that there had been error below, and also of showing that the error had been prejudicial. None of us is so wise that he can try a long case without committing some error. In addition to that the appellate division should have the power of awarding judgment." (Id., p. 288.)

Mr. Justice (now Senator) O'Gorman says:

"One of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits.

"We have a rule in our state that the commission of an error upon the trial of a cause by a trial justice is presumptively prejudicial to the appellant, and instead of the appellant being required to persuade an appellate court that he has suffered substantial wrong, the moment that he can place his finger on a technical error the burden is at once shifted, and the respondent required to persuade the court that there was no harm following that particular ruling. Now, we all know, and there are very few who seek to vindicate the practice, that very many cases are sent back from the appellate division upon alleged errors which have never affected the merits of the case. (Id., pp. 316-317.)

"At the present time nearly every defeated party is willing to take a chance of securing a reversal on appeal. They have every encouragement." (Id., p. 319.)

Determination on Merits.

In opposition to all the rules of technicality, which work such injustice and cause such delay, we urge that laid down by Chief Justice Marshall in Church v. Hubbart, 2 Cranch, 232, 2 L. ed. 263:

"It is desirable to terminate every cause upon its real merits if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."

Curiously enough the change in the practice of appeals in civil cases which is thus recommended has been already made in the state of New York in criminal cases. Section 542 of the Code of Criminal Procedure provides as follows:

"After hearing an appeal, the court must give judgment without regard to technical

[3] Reg. v. Gibson, L. R. 18 Q. B. Div. 537, 540.

error or defects, or to exceptions which do not affect the substantial rights of the parties."

In People v. Strollo, 191 N. Y. 42, 83 N. E. 573. At pages 61, 67, the court said:

"Under the statute our powers and duties in capital cases are strictly correlative. While we have power to reverse in the interests of justice, even where no exceptions are taken, it is also our duty to disregard errors which, although excepted to, do not affect the substantial right of a defendant. Guided by this rule, we feel constrained to hold that none of the general criticisms referred to under this head present sufficient grounds for reversal."

Technical Defenses.

In dealing with this important subject, we should put ourselves in the attitude of a lawyer who has a righteous cause, and who naturally desires to bring it to trial and obtain final judgment for his client as soon as possible. Is this not the attitude we always want to occupy? Doubtless, we are sometimes called upon to defend a client who has no defense upon the merits. As long as the law gives the right to interpose a technical defense and prolong the litigation, the lawyer is blamed by many if he does not exert his skill to the uttermost for that purpose. When we look at our profession from the standpoint of the commonwealth; when we consider that we are not only attorneys for a client, but officers of the court, and charged with an important part in the administration of justice, we must admit that we occupy a humiliating position whenever we undertake to defeat it. It may be a lawyer's duty to occupy this position under the existing system. All the more, therefore, is it our duty as citizens to endeavor to reform the system so that these means of procrastination shall no longer be available.

New Trials.

Another abuse which attends appellate procedure in many states is the multiplicity of new trials. So far as the Code states are concerned this had its origin in an unfortunate interpretation given to the Code of Procedure by the New York Court of Appeals in 1853 and repeated in 1858. The New York Code of Procedure was adopted in 1848 in obedience to the mandate of the Constitution of 1846. That Code abolished writs of error, and provided that the review of judgments should in all cases be by appeal. David Dudley Field, the author of that Code, intended by this provision to enlarge the power of the appellate court.

In 1848 it was perfectly well understood, as it still is in the Federal courts, that on a writ of error it was the function of the court issuing the writ to inquire whether there was a reversible error apparent on the record. But an appeal carried up the whole record, and the appellate court was bound to render such judgment upon this record as the law and equity of the case required. This practice had come down to the courts of chancery and admiralty from the Roman law. When we read in the book of Acts that St. Paul appealed to Cæsar, it did not mean that the Emperor's court at Rome would inquire whether Judge Felix had committed reversible error, but that the whole cause should be "reserved for the hearing of Augustus." It was for the Emperor, or his representative, to render such final judgment as his views of the Roman law required. Ordinarily no new trial would be granted.

But unfortunately, the court of appeals in Griffin v. Marquardt, 17 N. Y. 28, adopted a more narrow rule and applied to appeals, even in equity cases, the practice that had come to prevail upon the decision of writs of error.

It is true that Judge Comstock drew attention to the difference in the practice in this respect at law and in equity. At page 32 he says:

"In suits in equity, on the other hand, the practice was uniform for the appellate court not to grant a new trial or hearing in the court below, but to make a final decree, disposing of the controversy as it stood upon the pleadings and proofs."

Then he continues:

In the system introduced by the Code, where actions at law and suits in equity are no longer distinguishable as such, we have adopted no rule of practice in the respect now under consideration."

But, unfortunately, the court went on to adopt what experience has shown to be a wrong rule of practice, and to say (p. 33):

"It is proper to say, and to say it with great distinctness, as the opinion of this court, that extreme caution ought to be exercised in re-

fusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."

This decision has been followed. From time to time the general term under the earlier system, and the appellate division under the present system, has made a struggle against it, but in vain. The court of appeals has consistently adhered to Griffin v. Marquardt.

The latest of these decisions is Riker v. Gwynne, 201 N. Y. 143, p. 147, 94 N. E. 632. The court says:

"The appellate division, although reversing upon facts and law, granted judgment absolute in favor of the defendants. It is well settled by the decisions of this court that, unless the facts are conceded, or are so incontrovertibly established that they cannot be changed upon a new trial, the appellate division has no power to grant judgment absolute." Citing Duclos v. Kelley, 197 N. Y. 76, 89 N. E. 875.

In both these cases the action was triable before the court without a jury. In Duclos v. Kelley, the court impaneled a jury to pass upon two specific questions. But as the court of appeals said (p. 79):

"It is in substance a trial by the court without a jury, and a decision upon the whole evidence with the aid of the findings of the jury upon the two questions of fact submitted to it."

So that these two decisions do distinctly hold that under the New York Code as it now stands in civil cases, the appellate division has no power to try and determine questions of fact, nor (with some exceptions) to render final judgment upon the whole record.

I am permitted to quote in this connection from a letter which I have received from Judge Werner of the court of appeals:

"I thank you for the copy of your committee's report to the American Bar Association, and beg leave to say that it clearly states a reform which I have long thought should be carried into our state Civil Procedure. Nothing has done more to bring into reproach our administration of justice than the disposition of cases involving grave issues, upon purely incidental technicalities. Until the law of procedure is amended, our courts, of course, are powerless. I earnestly hope that the day is not far distant when the appellate courts will be relieved from the necessity of sending back for new trials cases in which the records on appeal clearly disclose the character of the judgments that should or must ultimately be rendered."

We thus find ourselves confronted with the extraordinary situation that under the Federal practice the circuit court of appeals has power to determine questions of fact, and is constantly doing so. It hears appeals in admiralty and equity from every district in its own circuit. The exercise of jurisdiction in that court is found to be beneficial. There is no complaint from suitors or counsel. On the contrary, the ability of the Federal court of appeals to consider questions of fact and dispose of them finally, greatly expedites procedure.

In that court our citizens have the benefit of a prompt and final decision of their causes. But when the same American citizens are involved in litigation in most of the state courts, they find themselves subjected to this multiple new trial rule. It cost the litigants in Reich v. Cochran twenty years of litigation (201 N. Y. 452, 94 N. E. 1080). So in Brady v. Cassidy, 145 N. Y. 171, 39 N. E. 814, the litigation lasted twelve years. All this time the defendants had been in possession of goods sold them by plaintiff, for which they had never paid.

What possible reason can be given for denying the appellate division of the supreme court the power that the chancellor possessed and which the Federal courts now exercise? The evil which results from the present system is within the frequent experience of every lawyer in active practice. How often does it happen that when the appellate court is compelled to send a case back for new trial, the counsel upon this trial read the evidence from the appeal book, the court renders judgment in accordance with the decision of the appellate court, and the case then starts again on its way to the final court of appeal. In cases involving title to real estate, where a *lis pendens* is filed, the property concerned is tied up during the period required for these two hearings, which is at least a year, and may often be much more. For the injury which the owner sustains there is absolutely no redress. The *lis pendens*, in cases to which it applies, is just as effective as an injunction. Yet no security

is required of the party filing it, for either damages or cost.

For example, in Riker v. Gwynne, the trial court found that a certain transfer was made to hinder, delay, and defraud creditors. Why should not the appellate division pass upon that question and decide it as a mixed question of law and fact? It is as well qualified to decide it as the trial justice. It has the printed record and the briefs of counsel. It has the aid of the opinion of the trial justice. To be sure, it does not see the witnesses, but this disadvantage is compensated by the rule which prevails in such cases in the Federal courts, that a finding of fact will not be reversed unless, in the opinion of the appellate court, it is distinctly against the weight of evidence. This rule preserves whatever benefit is derived from actually seeing the witnesses, and does not, however, prevent the appellate court in a clear case from rendering final judgment.

Legislation correcting the two defects in appellate procedure, which have thus been pointed out, has recently been adopted in Illinois, Kansas, Ohio, and Wisconsin. So far as these defects exist in criminal procedure, they have been corrected by constitutional amendment in California. Bills providing for their correction in Federal procedure are now pending in Congress.[4]

[4]Senate, Bill 3,750; House, Bill 16,461.

AN interesting paragraph in Mr. Moorfield Storey's recent volume on "Reform of Legal Procedure" pictures the simplicity and effectiveness of the present English methods:

Some years ago a friend of mine in England was watching the trial of a case, when one of the counsel called a witness. "Why do you call this witness?" said the judge. "I want to make the jury understand the working of a winch," was the reply. "Oh," said the judge, "the jury understands that," and, turning to the jury, he said: "Gentlemen, don't you all know what a winch is and how it works?" They all nodded assent. "You see," continued the judge, "you don't need this witness. Call your next." A little while later the case was given to the jury, who, as is very often the case in England, consulted without leaving the box. After a few minutes the judge turned to them and said: "Well, gentlemen, have you agreed?" "We stand eleven to one," answered the foreman. Addressing the counsel, the judge said: "Gentlemen, will you take the verdict of the eleven?" They assented, and the case was ended. This was practical sense, and it may be added that consultation by the jurymen under the eye of the judge and counsel should be encouraged. It insures attention to business, and avoids much waste of time in the jury-room.

Judicial Decisions and Public Feeling

BY HON. ELIHU ROOT,

President of the New York Bar Association

THERE appears to be an increasing tendency among Americans toward impatience with the courts whenever judicial decisions do not agree with our wishes.

The provisions for the recall of judges, already adopted in some states and widely advocated in others, are an exhibition of this impatience, and a demand for more unchecked opportunity to make the judges feel its effects.

A distinguished judge is reported to be considered for promotion to the Supreme Bench. Thereupon there arises not a discussion regarding his ability or integrity or experience, but an outcry that he ought not to be promoted because he decided a 2-cent fare case against the wishes of some people, or many people.

The court of commerce decides that the Interstate Commerce Commission has taken too broad a view of its powers under the law in a particular case, and the immediate reaction is not an acceptance of the decision and a proposal to change the law so as to make the powers broader, or an appeal from the decision in order to show by argument that it is wrong, but the drafting and introduction of a lot of bills to abolish the court.

A court of great authority decides that a particular form of employers' liability law contravenes the rules established by the Constitution, and the immediate reaction is not to procure the enactment of a statute which does not contravene those rules, or to procure a modification of the rules so that they will permit the statute, but it is to condemn the court for not entertaining a different opinion.

There are many indications that, in varying degrees, in different parts of the United States this method of treating the decisions of courts receives popular sympathy. A gradual decrease of respect for judicial decisions can be perceived.

The general respect for the decisions of our courts, which has sustained the judicial branch of our government as a distinctive and necessary part of our constitutional system, has been based upon the idea that judicial decisions are something quite distinct and different from the expression of political opinions, or the advocacy of economic or social theories. Profoundly devoted to the reign of law, with its prescribed universal rules, as distinguished from the reign of men with their changing opinions, desires, and impulses, our people have always ascribed a certain sanctity to the judicial office, have invested its holders with a special dignity, and have regarded them in the exercise of their office with a respect amounting almost to reverence, as above all conflicts of party, and of faction, because these officers are the guardians of the law as it is. Our people have been imbued with a deep sense of the truth that upon the preservation of the law as it is at every moment in its course of continuous change and development depend the preservation of order, the prevention of anarchy, the protection of the weak against the aggression of the strong, the perpetuity of the free institutions, the continuance of liberty and justice,—matters of infinitely greater concern than all the new proposals which excite the activity and controversy of parties and political leaders, of critics and reformers.

If this view is to be changed, and the decisions of our courts are to be considered in the same way, and upon the same presumptions, and with no greater respect for authority than in the case of political opinions, the authority of the courts will inevitably decline, the independence of the judicial branch will cease, judicial decision will interpret the

law always to suit the majority of the moment, and the recall will be the natural and logical expression of the relation to be assumed between the people and the courts.

Causes of Impatience with Courts.

What are the causes of this impatience with the courts? It is plain that the difficulty does not arise from any deterioration in the character of the judges who preside in our courts. There never has been a time when the bench in America, both under the Federal and state systems, has been filled by men of greater purity, ability, and strength, and uprightness of character. There never has been a time when the favor of the rich or of men powerful in social or business affairs played so small a part in determining the selection of judges. . . .

It is true that defects in procedure, that technicalities and delays which impede the courts of justice, here and elsewhere, have tended to decrease the general respect of the community for everyone concerned in the administration of the law, but I think this applies less to the courts themselves than it does to the bar, and justly so. It is the bar that makes up a great part of all our legislatures, and is responsible for the stupid and mischievous legislation regarding procedure which hampers the courts in their efforts to do justice. It is the bar which, knowing all the facts and familiar with all the evils, insists upon the continuance of our methods to promote the immunity of criminals and the hindrance of justice to the point of denial. The primary fault and the primary duty of reform rest with us. I do not think that this matter plays any very great part in the creation of the feeling against the courts.

The real difficulty appears to be that the new conditions incident to the extraordinary industrial development of the last half century are continuously and progressively demanding the readjustment of the relations between great bodies of men, and the establishment of new legal rights and obligations not contemplated when exisitng laws were passed or existing limitations upon the powers of government were prescribed in our Constitution. . . .

It is because in the course of this process of readjustment occasionally a court finds that some new experiment in legislation or in administration contravenes some long-established limitation upon legislative or executive power, or finds that some crudely drawn statute is inadequate to produce the effect that was expected of it, or enforces some law which has unexpected results, that the present irritation and impatience toward the courts have been created.

True Functions of Court.

There are several things to be said about this feeling. In the first place it rests upon a misconception as to the true function of a court. It is not the duty of our courts to be leaders in reform or to espouse or to enforce economic or social theories, or, except within very narrow limits, to readjust laws to new social conditions. Undoubtedly every judge is bound to consider two separate elements in his decision of a case: One, the terms of the law; and, the other, the conditions of actual life to which the law is to be applied, and it is only by considering both that the law can be applied in accordance with its real spirit and intent. But the judge is still always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve or change the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish, accordant with sound or unsound economic policy. It is very important to have reformers and advocates of all good causes and thoughtful and public-spirited citizens who are keenly alive to the defects in our system of laws, and solicitous to find means to cure them. But the courts are excluded, by virtue of the special duty imposed upon them, from playing any of these parts.

True Remedy for Unsatisfactory Decisions.

This impatience of the courts also proceeds upon a second misconception as to the true nature of the remedy for an unsatisfactory decision. When a court of

last resort has said the law is thus and so, and the law as so declared bars the way of some popular movement, the true remedy is not to threaten the court with extinction, or its members with punishment, unless they will decide against their convictions, but it is to set the lawmaking body in operation to change the law, and if a majority of the people wish the law changed it will be done. If the community is not satisfied with a law as it is declared by the court to be, the thing really desirable is not to coerce or reconstruct a court to say that the law is what it is not, but to make the law what the community wishes it to be. The only real obstacle to any such course rests in the fact that it frequently happens that the people of a state or of the country are not yet ready for the change which is desired by the impatient ones. These may be merely in advance of the rest of the people. It may be, and doubtless it frequently is the case, that their views are the views which ought to be adopted and which will ultimately be adopted by the people in their lawmaking, but the process of securing the adoption of new and advanced ideas may be long and tedious. It may involve a campaign of education, a reconciliation of conflicting views, and much discussion as to the kind and form of change. I cannot think that to incur the necessity of this process is an evil. Important changes in the law ought to be fully discussed and understood and approved by the mature judgment of the people of the country. We have too many immature and premature attempts at making laws before the subjects to which they relate have been thoroughly discussed and mature conclusions have been reached.

I must believe, also, that proposals, in whatever form, to subordinate the decisions of the courts to the decision of a popular majority, whether it be by punishing the judges for an unsatisfactory decision through removing them from office, or by reviewing their decisions at the polls as distinct from reviewing and revising the law upon which they are to decide, proceed upon a failure to realize that this involves an abandonment of the most essential feature of our system of constitutional government.

Inconveniences but Incidental.

We may grant that inconvenience frequently arises from decisions of courts finding that constitutional provisions are contravened by legislative action designed to express the popular will in particular cases. We may assume that some of these decisions are erroneous. It is impossible that there should not be some errors among fallible men under any system of government and any distribution of powers, although there are probably by no means as many errors as the ardent advocates of particular views suppose. But under every system and in every field of governmental action, it is necessary to submit to inconveniences. The true question, however, always is, whether, viewing the working of the general rule as a whole, the rule is so necessary to the well-being of the community, and its effects, taken altogether, are so valuable, that we ought to submit to the inconveniences, rather than to lose the rule. In considering the inconveniences which have arisen from decisions of the courts enforcing constitutional provisions as against popular statutes, it is a mistake to consider the particular incident by itself, and to lose sight of the enormous and overwhelming importance of the system to which these inconveniences are incidents, and to forget that by destroying the independence and authority of the courts and the popular habit of submission to their decisions we would lose infinitely more than we would gain. Let me try to state the essential thing that we would lose.

Limitations upon Power.

One of the fundamental ideas of our government is that all the officers to whom the people, whether of the nation or of the state, intrust the powers of government, shall be subject to certain definite prescribed limitations upon their power. These limitations are of two kinds: First, those which relate to the distribution of powers. The national government and the respective state governments are each to keep within its own prescribed field of action. The legislative, executive, and judicial officers are to be confined to their own departments of government. Within those departments particular officers, wherever it is

found expedient, have specific lines of limitation upon their power. If an officer undertakes to do something which is not within the prescribed limits of his authority, his action is void and without legal effect. No matter how able and patriotic a President or a governor may be, no matter how wise a congress or a legislature may be, no matter how much they may deem it to be for the public good that they should invade the field of action of another department, they are denied the right to do it, not because it might not be a very good thing in the particular case, but because the prevention of unlimited power is of such vast importance to liberty that no particular case can possibly be important enough to justify abandoning the maintenance and the observance of the general rule of prescribed limitations. The door opened for the well-meaning and far-seeing lover of country to exercise power without regard to the limitations set upon it is also a door opened for the self-seeking and ambitious to disregard the same limitations for their own advantage. It is impossible to maintain a rule of limitation upon power, which is to be observed when it seems wise, and ignored when it seems unwise.

Protection of Individual Citizen.

The other kind of prescribed limitation is for the protection of the individual citizen against the power of government. Our fathers had experienced some and observed many invasions of individual liberty and individual right of which governments had been guilty. They realized that the nature of men is not greatly changed by a change in the form of government, and that the possession of overwhelming power affords a constant temptation to override the rights of the weak. Accordingly, both in the nation and in the state, they prescribed certain general rules which prohibited all officers to whom they intrusted the powers of government from doing certain things, such as inflicting cruel and unusual punishments, abridging freedom of speech or of the press, prohibiting the free exercise of religion, putting any person twice in jeopardy for the same offense, compelling anyone to be a witness against himself in a criminal case, taking private property for public use without just compensation, depriving anyone of life, liberty, or property without due process of law. It frequently happens that inconvenience results from the application of these rules. Criminals escape because they cannot be tried twice or cannot be compelled to testify; public improvements are hindered because property cannot be taken except by due process of law; the liberty of the press and of speech often degenerates into license, and many poor people are misled to their harm by the doctrine of strange and irrational religious sects. Nevertheless the maintenance of these rules is the bulwark which protects the weak individual citizen in the possession of those rights which constitute liberty; and it is because these rules with all their inconveniences, if maintained at all must be always maintained, that the public officer who oversteps them, with however good intentions and for whatever benefit to the public, becomes a trespasser without authority and without protection of the law.

Rules of Conduct Abstract and Impersonal.

A second and equally necessary feature of our system is that these limitations, both those which distribute official powers and those which declare the great rules of right conduct, must be prescribed abstractly and impersonally, rather than with reference to particular cases, or particular exigencies, or particular individuals. The difference is generic, essential, world-wide. The very fact of making a constitution which is to be binding upon legislatures and executives and judges when they come to deal with particular cases exhibits the rules prescribed in the Constitution in sharp distinction from the determination of official power when particular cases arise. It is not possible for any human power to make the determination of a legislature or executive at the time of action the same thing as an obligatory general rule of conduct prescribed before hand. The difference between a constitutional convention prescribing constitutional limitations, and a legislature dealing with particular exigencies, is not that one represents the people any more truly than the

other, or is of any higher character than the other, but it is that one deals with justice, with right conduct, with the requirements of liberty, with a due balance and distribution of the powers of government impersonally and in the abstract, without reference to individuals, or the interests or prejudices or inconveniences of particular cases, while the other deals with the particular cases to which the general impersonal rule applies. So it is that at almost every session of our legislative bodies we find attempts made to evade or to appear to evade constitutional rules in order to accomplish specific purposes, when beyond a doubt the very body which attempts the evasion would refuse to abandon the rule as a guide to conduct, except in the particular case under consideration. Indeed if it were not for the fact that legislatures and executives would fail to apply the impartial and universal rules of our constitutions to the particular case with which they deal if left free at the time, there would be no occasion for constitutions. The provisions for amending constitutions are so framed in general as to provide for dealing with all of the subjects with which they treat in the abstract, as distinct from dealing with instances that arise under them legislatively in the concrete. So we deal with abstract rules by themselves, and we deal separately with the particular cases in which governmental action is to be governed by those rules. We know that human nature is such that the two cannot be combined; that a decision upon a rule of abstract justice cannot be combined with a decision as to the accomplishment of a particular wish, any more than a man can render justice when he sits as a judge in his own cause.

Judicial Determination of Boundaries of Limitations.

A third feature of our system which is a necessary corollary to the other two, and essential to them, is the vesting of power in the judicial branch to determine when the action of the legislative and executive branches, or any officer of them, oversteps the limitations which have been prescribed. Without this, all our bills of rights and limitations upon official power would be idle forms of words. If the lawmaking body of the moment, whether it be a representative legislature or a majority at the polls, is to determine at the time of action either what shall be the rules to control its conduct, or the question whether its conduct conforms to the rules already prescribed, that conduct is controlled only by the will of the lawmaking body at the moment of action, and our whole system of prescribed limitations upon power disappears. The necessary result is that the barriers we have set up from the beginning of our government against official usurpation of power, and against official invasion of the liberty and rights of the individual, are broken down, and the power of the majority according to the will of the moment is supreme and uncontrolled.

Justice Above Majorities.

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We cannot maintain one system in part and the other system in part. . . .

If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but we shall be exhibiting the weakness which thoughtful friends of free government the world over have always feared the most,—the lack of that self-control which enables great bodies of men to abide the slow process of orderly government, rather than to break down the barriers of order when they obstruct the impulse of the moment.

What is the remedy for this condition? How can the process be arrested?

The Courts.

I think the courts can do something. They may sometimes, perhaps, keep more fully in mind what Chief Marshall said in the case of Fletcher v. Peck: "The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Sometimes perhaps they make take a little more pains, when they have to decide against the constitutionality of a law, to make the grounds of their decision intelligible not merely to technical lawyers, but to laymen. Although the decision in a case technically affects only the parties, when the case becomes the occasion for a decision affecting great numbers of people, it is as much a judicial duty to see that the people do not misunderstand the ground and scope of the decision, as it is to see that the parties and their counsel are informed.

It may be also that some judges who have been long withdrawn by their duties from active participation in current affairs could profitably study with more interest those changes of social conditions which make necessary new applications of the police power of the state,—that vast and adaptable power preserved in all constitutions, the basis of which rests in common sense, and the relations of which to the specific guaranties of the Constitution must always be subject to adjustment according to the varying needs of the time. . . .

The Bar.

The bar can do much. A lawyer has special opportunity to acquire a just sense of the importance of preserving the constitutional system of our country, and of maintaining the undiminished power of a really independent judiciary. He can explain this and insist upon it among his clients and his fellow citizens in private and in public, and can secure for it from citizens in general that attention and thoughtful consideration which alone is necessary to secure just results among an intelligent people.

True Progress Based on Reason and Self-Control.

One other thing we can all do, and that is, to encourage and exhibit the true spirit of temperate and patriotic consideration, which is the primary requisite to success in working out the problems of self-government. Some of the recent discussions of judicial conduct have been dignified and temperate expressions of reasoned opinion which we must respect, although we may not agree with it, such, for instance, as the recent article by Mr. Roosevelt in the Outlook. Some other expressions, however, have been rather exhibitions of violent temper and appeals to prejudice, imputations of sinister motive, and incitements to hatred. The appeal to prejudice and passion and hatred finds its natural sequence in appeals to force and in destruction of order. True love of country is not mere blind partisanship. It is regard for the people of one's country and all of them; it is a feeling of fellowship and brotherhood for all of them; it is a desire for the prosperity and happiness of all of them; it is kindly and considerate judgment toward all of them. The first duty of popular self-government is individual self-control. The essential condition of true progress is that it shall be based upon grounds of reason, and not of prejudice. Lincoln's noble sentiment of charity for all and malice toward none was not a specific for the Civil War, but is a living principle of action. These are truisms, but if at any time they should be forgotten (and they seem to be sometimes), we should remember that they are also essentials; and we should recall them, and insist upon them, and preach them, for they are part of the gospel of human freedom.

Probate Proceedings and Reform

BY HON. JAMES V. COFFEY

Judge of Superior Court of San Francisco

IN undertaking to indicate wherein probate proceedings should be reformed, it is necessarily assumed that there are serious defects and faults that should be amended and corrected, and abuses or evils in practice and procedure that should be remedied.

We hear often that we have too much amendatory legislation, and that the less interference with the statutes the better. So far does this comment go, that each session of the legislature seems to inspire popular apprehension which is not allayed until adjournment; and many citizens in good faith profess that we might better have shorter sessions at longer intervals, leading logically to the conclusion that this branch of the government might be dispensed with entirely.

Importance of Probate Court.

The probate court passes upon every particle of property transmitted from sire to scion, and the integrity of patrimonial title is dependent upon the validity of its decrees. Its importance may be inferred from the fact, as was pointed out by the late Judge Myrick of the old probate court of San Francisco, that the average period which elapses from the time that a lot of land passes as a part of a succession until it again requires administration is ten years; that in this state (a peculiarity of law not found elsewhere) all realty becomes assets in the hands of the administrator, to be marshaled by the court for distribution, and that every such adjudication is a careful ascertainment and expunging of all claims and obligations of decedents, a matter that by its nature requires the greatest personal care and attention from the judge, with a continual dread that some covert error may escape his scrutiny to emerge, perhaps, when judge and counsel and client have passed away, clouding titles and impairing values of real property.

It is a matter of every-day experience to find errors of a minute kind, microscopical mistakes, that have eluded the most careful examination of vigilant lawyers and judges, cropping up as objections to title to property, where owners have rested secure in their possession for a generation, not suspecting a flaw or irregularity in the probate proceedings.

When it is considered that the assessed valuation of property in San Francisco is about $500,000,000, real estate and improvements, it may be realized how responsible a part is taken by the judge who accepts the assignment in probate. All of this vast amount passes through probate in the course of a scriptural generation, and, under the system prevailing, it needs the most exacting judicial care to avoid error in the transmission of title from ancestor to heir.

Simple and Economical Procedure.

We come then to the purpose of probate. What is the occasion of all this expensive environment? It is simply to clear the title to the decedent, freed from all liabilities contracted in the lifetime of the original owner, and from charges incurred in the nature of succession taxes and other expenses incident to the protection of the property right.

Now, apart from issues of contested heirship, disputed wills, and other litigable matters, we are concerned with the question of reforms needed in the ordinary administration of estates. Why should it be so onerous upon an heir to secure his inheritance? Why all this cumbrous and costly machinery before he can come into his own? It is easy to answer, it may not be his own; because there may be others whose claims must be investigated, and delays are necessary to ascertain the validity of their pretensions; but we are dealing with the common cases of those whose rights are uncontested.

The practice and procedure in such cases should be simple, expeditious, and economical. In a plain case, where there is no contention and no complications, the cost should be less than where there is a contest or a conversion of assets or other reasons to adjust relative rights of kin or creditors. We have now a statutory schedule of compensation for attorneys but while this is an improvement upon the old plan, it needs to be readjusted to more equitable relations to the service.

An attorney, as any other laborer in the vineyard of the law, is worthy of his hire; but he should be paid in proportion to his work. We forbear the use of Latin, even of law Latin, but *quantum meruit* is the appropriate phrase. What he earns, the lawyer should receive. It is a mistake to give him more; it is unjust to lessen the remuneration of his efforts in behalf of his clients.

In this respect, probably the most equitable plan of compensation for attorneys in probate was that framed by Justice Lucien Shaw, now of the supreme court, while he was acting as probate judge in Los Angeles, a graduated scale based upon the different species of serv-

ices rendered. Years before a similar schedule had been in force in San Francisco, in a certain class of cases, but it had to bear the brunt of great opposition until finally the principle was adopted by the legislature and is now in force.

But it is not altogether satisfactory; it is too rigid; there should be a maximum, and the judge should have the power to reduce according to circumstances and character of the estate. The Shaw schedule approximated equity in principle and practice, and its perfection would be a differential schedule which would be based upon the kind and value of the property; that is to say, if the estate consisted merely of money, cash in hand or deposit in a bank, and no labor apart from custody of assets, or unimproved real estate involving no special service, the compensation should be less than in cases requiring particular skill and unusual attention. To an extent, this is now the statute, but it is not sufficiently definite, and is often overlooked.

Many other economical reforms might be suggested in probate. In the matter of real-estate transactions, there is a necessity of thorough renovation; the policy of the law should be to keep the realty intact until distribution. A sale in probate is a sacrifice, as a rule. It is accompanied by conditions calamitous in costs, and attendant with technical perils that affright both vendors and purchasers.

Some years ago a state senator, a lawyer of ability conceived a scheme of amendment, and introduced some bills practically repealing all the old probate provisions in regard to realty; but there was no support from his colleagues and no general encouragement elsewhere, and he appeared to have abandoned his project. It was asserted that he attempted too much at one time. What is needed at present and what is practicable is to modernize the methods of procedure by a judicious pruning of unnecessary features.

Eliminate Mere Technical Requirements.

We need not "expunge the whole" at one stroke, but may "lop the excrescent parts," preserving a simple and symmetrical system free from mere technical requirements that serve no useful purpose. These technicalities in procedure are the bane of our practice, and this is not the opinion only of intelligent laymen, but of erudite and skilled lawyers, one of whom, a noted law writer, John D. Lawson, in an article in the Kansas City Bar Monthly, pronounced "the judicial system of all our states, both in the organization of courts and methods of procedures, archaic," and he attributes the failures of justice in so many cases to the disposition to overlook the substantial merits of a cause and give undue importance to superfine technical points.

If his criticism be just in general, it is certainly so in matters of probate; but the fault is in the law, and to the legislature we must look for correction, and the lawyers in that body should endeavor to remove, by judicious amendment, the reproach of this severe censure. Innumerable instances exist of hardship and pecuniary damage arising from too strict technical construction of the probate act. Cases there are where thirty years and more have elapsed after the supposed settlement of an estate, and in which some slight defect in the publication of a notice, an error of the printer, perhaps, an apparently trivial trick of the types, has been held to vitiate jurisdiction and annul all subsequent proceedings to the infinite and irreparable injury of innocent property holders.

In an estate involving millions it was discovered that a notice of probate in a daily paper was inserted only three times a week, whereas the law required it to be published every day, unless the order for publication prescribed otherwise. This mistake was found out accidentally a long time after right had vested and every party connected with the matter had reason to rely on the integrity of the record; but it was held that the party alleging this irregularity had no status to complain, and he was demurred out of court, and the objection was not revived.

In another case the lawyer for the executors, a former justice of the supreme court, most distinguished in his day, failed to obtain an order to publish notice to creditors, proceeding with publication without precedent judicial sanction, and at the end of the year it was found that by reason of this oversight he had to republish, much to his chagrin, and this involved risk to property interests amounting to more than a million dollars. The lawyer said that it was nonsense to make such a ruling, but the answer was that the law was so written and he had to submit, otherwise the whole proceeding would be void.

Examples might be multiplied indefinitely to exhibit the evil consequences of the hypertechnics of detail in administration of this branch of the law; and there is no end of the expense connected with it. Here, then, we need intelligent revision to make plain the methods, curtail the cost, and expedite the process of settling estates. An examination of any account in probate will show where reduction may be made. We have three appraisers where one would suffice, quite a tax in most estates. Where a sale is made, it sometimes happens that the costs of advertising, commissions, appraisers' fees, and other items absorb the entire estate, leaving no margin for the heir.

This is an extreme case, perhaps, but the fact is that there is a multitude of instances where poor persons with small holdings are mulcted in oppressive penalties for the privilege of securing probate evidence of title to their property.

These suggestions reach only a few of the many matters that might be embraced in a comprehensive scheme of legislative reform in probate practice and procedure.

Faulty Procedure in Civil Cases

BY R. H. GWYNNE
of the New York Bar.

RESPONSIBILITY for the backward state of procedure should not be borne wholly by the legal profession, but on the other hand should be shared jointly with a legislature that has undertaken to do something which it is incapable of doing properly; to wit, enacting rules of practice for judicial proceedings. In so far as courts are free to frame their own methods of procedure, the practice is apt to be good; and in so far as the legislature has entered this field, the practice is apt to be bad; and it is especially so in New York, where the cumbersome and illogical Code of Civil Procedure governs practice in civil cases.

Premising, then, that the fault lies chiefly, if not altogether, with the legislature, and not with the lawyers, it may be profitable to examine a concrete case.

An Instance.

The case of Flanagan v. McDermott, 132 App. Div. (N. Y.) 166, is a typical practice case, and a good illustration of the illogical and wasteful methods sometimes employed in submitting civil disputes to the courts.

The defendant had written a letter concerning the plaintiff to one Murphy, in which he gave the following piece of gratuitous advice: "My Good Sir: Experience is worth a million dollars. I will know better in the future not to give a man that has no more honor than to expect every new man he breaks in to treat him to a glass of booz, or turn him down as incompetent. If you are an advocate of rum, stick to Flanagan." The plaintiff considered himself libelled, and brought this action to recover damages. The complaint simply set forth the letter, without innuendoes, and alleged that it was written and published of and concerning the plaintiff, to his damage, etc. The question therefore was: Has the plaintiff been libelled as he asserts in his complaint? and the presentment of that question to a jury for adjudication in the quickest possible way is the end desired. Apparently nothing could be easier.

Code § 535.

Section 535 of the New York Code of Civil Procedure is a familiar passage, and is in part as follows: "It is not necessary, in an action for libel or slander, to state in the complaint any extrinsic fact, for the purpose of showing the application to the plaintiff of the defamatory matter; but the plaintiff may state generally that it was published or spoken concerning him; and if that allegation be controverted the plaintiff must establish it on the trial." This provision was intended to simplify pleadings in defamation suits, but in this it was only partially successful, for the decisions construing that section laid down the rule that when the words complained of were not libelous on inspection, innuendoes must be set forth.

A Demurrer Interposed.

The pleading was carefully scrutinized and debated upon by counsel for the defendant, with the result that it was determined to take the stand that the complaint did not state a cause of action for the reason that the words used were not libelous *per se;* and to that end the office force spent a day and a half running down decisions on this point; and upon the twentieth day a demurrer to the complaint was served.

In due course of time this question came on for argument before a judge at special term; and a week or so thereafter said judge found that the complaint did in fact state a good cause of action, and thereupon directed the defendant to serve an answer so that the facts of the case might be submitted to a jury. But defendant did not do as he was told; he appealed. Again the question was argued, this time on printed briefs; and the appellate division, after due deliberation, were of the opinion that the complaint did not state a cause of action, and reversed the trial judge. All this took eleven months of valuable time, and how far had the plaintiff progressed in his attempt to present the case on its merits? Well, the appellate division advised him that he might serve an amended complaint provided he paid $132 costs to the defendant. This he did not do, and so the action ended.

Possible Amendment.

The opinion of some may be that the case is a very simple one for the reason that, after the demurrer had been interposed, the plaintiff could have looked into the question, and have amended his complaint as of course by inserting the innuendoes, and thus would be in a position to present the question of libel or no libel to a jury, and that such practice is in fact good law. True, we say, and that is probably just what plaintiff did, but his researches must have convinced him that he was right and his opponent wrong, and so he

determined to stand by his pleading as originally drawn; and as we have seen the trial court agreed with him. Perhaps the court of appeals would have too. Who can tell? Any question of procedure that approximates this one for uncertainty in application is simply bad practice, and nothing else. Here is a perfectly simple point in pleading which has taken eleven months to "litigate" and involved the plaintiff in no less than $132 costs. Section 535, above mentioned, consists of but a few lines, and yet an attorney has to examine over sixteen pages of annotations in fine print before he is sure of what it says; and the case of Flanagan v. McDermott goes to show that he isn't quite sure then.

Wasted Time and Effort.

Long hours are wasted in looking up authorities on these trivial questions of practice, and we are no better off afterwards than when we began.

What a plaintiff wants in a case like this is to get the judgment of the court on whether or not he has been libelled. He is simply amazed at the months wasted by the lawyers and courts in trying to decide another question. The trial judge decides one way, the appellate court the other. His counsel explains that the point is a very close one and requires time. Indeed it is *very* close, and it requires much time.

The defendant's counsel looks over the complaint and is thus informed that his client is sued for libel, and he immediately questions whether or not the words used are a libel; but that question is for a jury to determine; then by all means get it before a jury. The defendant is not one bit better off by being told by innuendo that plaintiff construes this or that to mean that he is accused of being drunk. This is implied by the commencement of the action, and if there is any doubt on the trial as to the plaintiff's contention, let the complaint be then and there amended so as to state the fact more clearly.

Purpose of Complaint.

A complaint has two purposes: First, to apprise the adverse party of the facts which make up the plaintiff's cause of action: Second, to serve as evidence for plaintiff as to those allegations which are not controverted. In so far as it fails to fulfil the latter condition, it is the pleader's own fault; but in so far as it fails of the first, there should be a summary and expeditious remedy for the defendant to have the necessary allegations inserted.

Leave Practice Questions to Judge.

The first of these purposes is what causes the trouble and wastes time, and it would seem clear that the opposing party is fully protected when he is provided with a remedy that is commensurate with the wrong to be righted. If a party were required to examine a pleading on its receipt, and within three days thereafter move (on one day's notice) to make more definite, or for more particulars, or to strike out this, that, or any other of the defects common to pleadings, all this to be decided by the judge on examination of the pleading, and without citation of authority, much good would be done, for of all things that can be decided by common sense alone it is these questions on practice. The submission of briefs and lengthy citation and argument on such minor points is ridiculous. Furthermore, there should be no appeal. Discretion must be lodged somewhere, and a judge at special or trial term is quite capable of bearing this responsibility.

Such a method would be business-like and litigants would not feel that they were being trifled with.

Lets Courts Regulate Procedure.

And just this kind of practice would result if the legislature would confer on the courts authority to regulate procedure in its entirety, reserving to itself such matters only as are in the nature of substantive law. This would be perfectly constitutional, and would be conferring on the judges a power which they, and not the legislature, are competent to exercise.

Our present practice, of course, has been built up by adjudged cases, the rigid Code sections serving merely as a nucleus around which the decisions gather; and a procedure built up on judicial decisions is the most costly and uneconomic method imaginable. The rules of pleading and practice, it is true, are the fruit of experience, but in this department of law such rules should be crystallized by legislation as soon as practicable. What is wanted is legislature. Not legislation from afar, however, as in the case with the legislative department of the government, but legislation from that body of officials who are in closest touch with the workings of the courts,—the judiciary.

A complete code of procedure enacted by the judiciary assembled in convention for that purpose would have the merit of stating in clear and unequivocal language just when and how the court machinery was to be moved. It would be clear, because the persons legislating would know from close experience, as no one else could, just what was desirable and what was not, and would be able to mold the practice into exact conformity with its needs. And such a code, together with a reasonable amount of uncontrolled discretion reposed in the individual judge administering it, would work miracles with litigation. Any system of procedure that is based on a rigid adherence to precedent is simply making the error of yesterday the law of to-day.

John Doe

By William D. Totten of the Seattle (Wash.) Bar.

In ages past historians have written many books,
Of countries, kingdoms, warriors, saints, and celebrated crooks,
But none have sung the praises of a man the world should know,
The sometimes menial, e'er congenial fellow called John Doe,
Yet back in old Westminister in Ancient London Town,
Our hero won his youthful spurs and came to much renown.

He was and is a fanciful production of the mind,
The offspring of necessity by wit of men designed,
Imagination only was the parent of the plan
To bring into existence, this imaginary man,
With imaginary whiskers, imaginary hair,
And imaginary human traits, that human beings share.

Now no one knows who named our friend,
Nor yet just when, or how,
He happened to avoid the name of lioness or cow,
But every one who needs his name
Congratulates his luck,
Of being able to avoid the writing of John Buck.

He was an ever ready chap, residing near the clerk,
To greet the bar good morning and assist them in their work,
For want of names of parties in the happy long ago,
They didn't take the name in vain of chummy old John Doe.
The judges recognized him as a substitute for one,
To help along proceedings so that justice could be done.

The cold keen scissors of the law have many victims sheared,
But John retains two bales of hair, likewise a bale of beard,
And when he treads the courthouse aisles,
With quiet stately pride
Two bailiffs bear his whiskers,
As attendants on each side.

He once enjoyed the reading of each curious writ and plea,
The lengthy declaration and the bill in chancery,
He liked the surrebutter—
And the surrejoinder too,
And all the other rigmarole
The big wig lawyers knew.

He much adored the practice of the old time common law,
And nursed an admiration
For its hidden tooth and claw,
But when it passed its usefulness
And came the modern Code,
Old John beneath its sheltering wing took up his new abode.

He misses old ejectment friends,
And sighs and says Ahem—
How well I now remember
Dear old Jackson the "Ex dem,"
The only relatives on earth
To cheer my lonely life
Are Richard Roe and Mary Roe,
And Jane, my handy wife.

And often times the judges say
"Good morning dear old John
You're spry as any yearling
And you're fair to look upon,
When we shall leave this vale of tears,
For heaven's celestial shore,
May you be here to litigate,
And live forevermore."

Correspondence

Suggestions as to Procedural Reform by two former Presidents of the American Bar Association—more about Judicial Recall.

Suggested Reforms.

Editor CASE AND COMMENT:—

You have asked me to state briefly what seem to be some of the most important steps which can be taken to reform legal procedure.

In considering this question it must be borne in mind that the law is interpreted and enforced by courts, and that the essential and permanent feature in all courts is the judge. No matter how wise the legislatures or how good the statutes which they pass, unless the latter are intrepreted and enforced properly, they soon become dead letters. The court is the machine by which the laws are made to work. What our community needs most at this moment to repress the lawless spirit which prevails everywhere is a strict enforcement of existing laws. To secure this we must have able and strong judges, and my first suggestion is therefore that we should do what is necessary to make the bench attractive to the very best men. We cannot afford to have any other. Lawbreakers command the best talent, and the public must have men able to cope with their counsel. To get such men we must offer adequate salaries, assured tenure, and freedom from impositions of every kind. When to reach the bench a man must submit to the demands of a political committee, must pay perhaps a year's salary into a campaign fund, must encounter the mudslinging of a popular election, and then must consider how far his continuance in office depends on suiting his judgments to the public taste, few fit men will become candidates for judicial positions. Attacks on the bench by men who disagree with its judgments, and all suggestions of short terms or the recall, should be discouraged.

Having got good judges, we must give them adequate power, and uphold them so long as they use it honestly. Some one must have power to do justice, and to no one can this power be trusted so safely as to an honest, able, and impartial judge. The judge should have all the power that he had in courts of common law; and the statutes which prevent his charging on facts, which forbid him to give any instruction to a jury save those which counsel prepare, and like enfeebling laws, should be repealed.

In the third place we must do away with repeated appeals. One trial on questions of fact, and one review on questions of law, is all that any litigant has a right to ask, and all that the state can afford to give. *Interest reipublicæ at sit finis litium.* The trial of the facts should as far as possible be shaped so as to make the finding final, and let the court upon the facts so found enter such judgment as the law requires, subject to correction by the appellate court in case of errors.

The judgment of a court should not be reversed on appeal except for errors which affect the substantial rights of the parties. Errors which go only to form, and not to substance, should be disregarded. The American Bar Association is urging the passage of a law to accomplish this.

The trial of cases by masters, examiners, auditors, and like officers should be controlled so as to avoid the delay and expense of the present system which allows parties in effect to try when they please and as long as they please, putting in whatever evidence they please. The court should at a preliminary hearing decide what issues should be sent to the master or like officer, should as far as possible control the proceeding at all stages, and should take precautions to insure prompt hearings.

These are perhaps as many suggestions as you will expect from one contributor, and I will stop here, though many more might be made, and these could well be amplified or qualified.

MOORFIELD STOREY.

Boston, Mass.

The Law's Delay

Editor CASE AND COMMENT:—

You ask me to express my views "to the extent of a few paragraphs" on the important subject of "Procedural Reform."

I understand that you use these words in a broad sense, and not in a narrow and technical sense. The subject is so large when used to cover the field of reforms that will "facilitate the administration of justice," that a brief expression of my views, will, I fear, be of little interest or value. Confining myself to the *delays* in the administration of justice as the phase of the subject most generally discussed, the following remedies suggest themselves:

(1) Greater simplicity in legal procedure. England, the home of the common law, has thrown aside the technicalities of common-law pleadings and practice, and adopted a simplified procedure, which can be studied to advantage.

(2) The adoption of the recommendation of the American Bar Association that appellate courts should not set aside the decisions of the lower courts for technicalities, but only for reasons that "injuriously affect the substantial rights of the parties."

(3) That the powers of judges should be enlarged rather than curtailed, so that they may exercise all their common-law functions as judges. The tendency of modern legisla-

tion in the United States is to make a Judge a mere umpire at the trial, instead of an important factor in reaching a just result. A comparison of trials in England with trials in this country will satisfy most lawyers, I think, that the administration of justice in England is not only as certain and satisfactory as in this country, but that this result is reached much more expeditiously than with us, and largely through the influence of the judge who presides at the trial. CHARLES F. LIBBY.

Portland, Me.

The Recall in Arizona

Editor CASE AND COMMENT:—

When Congress passed the enabling act, permitting the people of Arizona to elect Delegates to a constitutional convention to frame a Constitution for the proposed new state, the Democrats were wise enough to see the psychological moment," and injected a recall plank into their platform, and the consequence was that the Convention was overwhelmingly Democratic, and at the election for state and county officers, December 12th, 1911, two United States Senators, and a Representative in Congress were elected on the Democratic ticket, and all state officers on the Democratic ticket were elected. All the Democratic candidates championed the cause of the recall.

The immense popularity of this measure is due, in some respects, to the system of government administered by Federal officials holding office by presidential appointment, the people being thus deprived of any voice in their selection, or as to the length of time of their service. Not that we have not had some very able and trustworthy officials in this territory, but the principle of the love of self-government, so dear to all Americans, permeated the very soul of our citizens to such an extent that a great dissatisfaction has for years manifested itself in every nook and corner of the territory.

When the proposed Constitution was submitted to President Taft, he stated in very emphatic terms that he would never grant statehood to Arizona, until the Constitution was resubmitted to the people, and the judiciary excepted from the recall provision applying to all elective officers of the state. The people being very desirous of obtaining statehood, amended the Constitution so as to exclude the judiciary from the recall provision, at the general election for state and county officers, December 12th, 1911, by almost a unanimous vote, but the legislature, almost to a man, is pledged to make provision at the beginning of the first session to resubmit the question of the recall of the judiciary to the people, and we entertain no doubt but that they will do so, for under Article VIII. § 5 of the Constitution as it now stands, all officers will be exempt from the recall, for the first six months after they qualify, except that a recall petition may be filed against a member of the legislature after five days from the beginning of the first session after his election. This provision was made because of the fact that the legislature is elected every two years and meets biennially, and if they were not excepted from the six months' provision, it would be, for all intents and purposes, ineffective in so far as they are concerned.

It is the opinion of all men well informed on the political situation of the new state, that the judiciary will be included along with the other officers of the state when the people once have an opportunity to express their wishes at the polls, free from Presidential coercion, and why should it not? A judge is only a lawyer elevated to a position of great honor and trust by his constituents, and when he violates the great trust imposed in him, he is no more entitled to serve the people, than is the governor or other officials of the state entitled to remain in office after they have proven themselves recreant to the trust imposed in them.

Some of the enemies of the recall declare that it will seldom, if ever, be used, and will therefore be practically a dead letter in the law. Granting that assertion to be true, so much the better, but if it should ever be needed, we fail to see why that it will not be a good law. We might also state that many of the organic laws of the land are practically a dead letter, in so far as their violation is concerned. The law against treason, for instance, might for the same reason seem useless, yet the time might come when the very existence of our nation depended on whether or not we had such a law.

There is one incontrovertable fact, the people of Arizona are going to give the recall a thorough trial, and whether or not it will be as popular in a few years hence, time alone can tell. GEORGE W. HARBEN.

Williams, Arizona.

Editorial Comment

O, reform it altogether—Shakespeare.

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Edited by Asa W. Russell.

The Law's Delay

THE subject of the "law's delay," a complaint as old as the days of Herodotus, is now receiving unusual attention, and has been discussed from many different standpoints. The law's delay is the law's weakness and its greatest reproach. Justice delayed is often justice denied. Hardships are borne perforce because of the uncertainty and delay of the administration of civil law. In this matter the American people have shown themselves so remarkably patient in the enduring of inconvenience that frequently amounts to actual wrong, that we may marvel at their calm forbearance. But their continued acquiescence cannot be presumed upon. Our system of judicature is being criticized as never before. Respect for the judiciary—a very necessary thing in this country—is decreasing. The ominous shadow of the "recall" looms on the horizon like a storm cloud.

It has sometimes been unjustly charged that the lawyers profit by a cumbersome and expensive procedure, and are loth to change it. As a matter of fact no one deplores the law's delays so much as the lawyer, to whom professional time means income, for the quicker the pace the more litigation he can handle in a year. But busy practitioners are apt, in the press of business, to become indifferent, while judges, finding a stream of cases flowing through their courts, rarely stop to inquire the time intervals of a particular litigation. It is easier to float with the current than to stem it.

But there is hope of better things. The ablest lawyers and judges of our country are discussing defects in our legal system, and have united in urging reforms that will simplify court procedure. Bar associations are active in the work. Legislatures are being appealed to. It would seem that at last a simplified procedure is actually in sight.

The abolition of the "law's delays" is a subject that lies very close to President Taft's heart. He has referred to it many times in messages and public addresses. His attitude on the question has given a powerful impetus to the reform movement.

But the fact should be emphasized that this work must be taken in hand seriously, and prosecuted vigorously. It will not do to discuss the question in an academic way, idly propose all sorts of schemes, adopt long resolutions, and then let matters continue as they are. The temper of the people demands action.

Federal Equity Procedure.

The equity rules of the Federal courts are based on the old English chancery

practice, and were originally adopted in 1789, and have been in force practically without change ever since, although abandoned in England nearly forty years ago.

In response to an almost universal demand from the bar the Supreme Court of the United States appointed a committee headed by Mr. Chief Justice White, together with Justices Van Devanter and Lurton, to take up the matter of revision, and suggest desirable reforms. To aid them in this work the justices called upon the various circuit courts of appeals to appoint committees of their respective bars to suggest changes in the equity procedure that in their practice they had found desirable, and such committees were named in each circuit.

Justice Lurton has prosecuted inquiries into the reformed equity procedure in England. He held frequent conferences with the lord chancellor and the lord chief justice.

The changes recommended are likely to be radical, but in the interest of greater simplicity in procedure and a lessening of expense to the litigants. If adopted, an example will be set that cannot fail to have a reformatory influence on much of the antiquated procedure of our state courts.

The Poor Litigant.

An adverse, decision is less to be deplored by a suitor of limited means, than prolonged litigation. This thought is well illustrated by an incident related by Ambassador Jusserand. "When I was in Tunis thirty years ago," he said, "I was told of the Prime Minister of some time before, Khereddine, passing on horseback through the city, when an Arab rushed to him, stopped the horse, and clamored for justice. Amused, the minister listened and said: 'Thy case is a well-known one; I have studied it thoroughly, and since thou wantest it to be decided at once, I decide, as in duty bound, against thee.' Kneeling, the man kissed the hand of Khereddine. 'Thou hast misunderstood me,' said the minister. 'I have pronounced against thee.' 'I have understood thee very well,' said the man, 'but I am full of gratitude now it is finished.' "

It is not especially creditable to our system of judicature that the party with the longest purse is the one who has the most chance of winning a suit. Yet such is the case, and this is said without intention to question the integrity or fairness of any judge who has ever or now sits upon the bench. It is because the judge, in pronouncing his judgment, finds himself hedged about by an infinitude of precedents which permit a crafty or specious pleader to interminably prolong the litigation.

"One great crying need," writes President Taft, "is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment. Under present conditions the poor man is at a woeful disadvantage in a legal contest with a corporation or a rich opponent. . . ."

In a message to the legislature, the governor of New Jersey states: "Our legal procedure is too technical, too complicated, too expensive, too little adapted to the use of the poor and the unschooled. With splendid courts of undoubted integrity, we still feel that the rich litigant can tire the poor litigant out."

Tardy Justice.

Delay may work especial and irreparable injury in criminal prosecutions. This is well illustrated in the New York case of Nathan Schlessel. He was convicted in the court of general sessions in New York on a charge of removing his assets with intent to defraud a creditor. He served his full term in prison and was discharged. Later the court of appeals handed down a decision setting aside his conviction and ordering a new trial. Could anything be more farcical?

This is the record of the case: The crime alleged was committed in November, 1903. The indictment was not returned until June, 1905. A demurrer was interposed, which was disallowed in February, 1906. The case went to trial in November, 1907, resulting in a conviction. The matter came before the court of appeals in November, 1909.

Justice Bartlett scarcely did the subject justice when he mildly observed, in the course of his opinion: "It is not too much to suggest that greater expedition

than this ought to be readily attainable."

What greater travesty of justice could the imagination conceive than a reversal of a judgment of conviction, six years after the date of the alleged crime, and after the defendant had already completed a term of imprisonment based on a verdict that it now appears was illegal?

But that delay which wrongs the innocent may aid the guilty and bring the law into contempt. "That sovereign punishes with double efficiency and with triple certainty," said former Attorney General Bonaparte, "who punishes while the crime is rank and recent."

It is an age-old problem; for, says Ecclesiastes, VII. 11: "Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil."

"The law's delay" is listed by Hamlet among the evils to which flesh is heir. And at the time Shakespeare wrote the soliloquy, the English courts were somewhat sluggish, but they have reformed since then; and it remained for American tribunals to write eternity as a synonym for justice.

The Lawyer's Delay.

While awaiting necessary changes in the law governing judicial procedure, there should be insistence upon the correction of such faults as present agencies can eradicate. This leads to the inquiry: How far are lawyers responsible for the proverbial law's delay?

It has been asserted that 90 per cent of the time wasted in the conduct of litigation is due to the system under which the law is administered, rather than to the intention of the attorneys interested in delayed suits, or the benefit resulting to either side from delays. It may be admitted that counsel seldom intentionally pursue a Fabian policy in the conduct of litigation. But they ought not to be permitted to evade their just share of responsibility so easily.

Not long since in a New York court there were forty cases on the day's calendar, but in not one of them were the counsel ready to proceed to trial. The rule seems to be for the lawyers to fight against going to trial, rather than to get to trial. One reason for this is that cases of a certain class,—torts, for instance—tend to concentrate in the hands of certain large law firms, which have to organize, like a business concern, and divide their labors. When a case comes up the right man cannot always be spared, or he may be engaged elsewhere.

"Professional courtesy" many times deters lawyers from forcing causes to trial against the wish of opposing counsel, even when the latter are unable to assign any valid ground for postponement.

The preparation of a cause for trial involves complete disturbance of the prevalent course of business in an office, and imposes upon counsel such complete separation from all the other concerns of his practice, that court attendance is a matter of great inconvenience and difficulty. This leads to postponement in the hope that, when the case reappears later, conditions may be a little more favorable.

A drastic order that counsel must be ready for trial, or have their cases dropped from the calendar, has sometimes been found necessary, and has expedited the transaction of court business.

Delay at Trials.

One cause of delay is the fact that trial work is frequently done by inexperienced men. In England all trial work is done by barristers who are trained to that one thing.

Some lawyers go into court with their cases but half prepared, which entails on the judges a mass of work that, to be conscientiously done, takes up a great deal of their time.

The length of trials might be materially shortened by the firm hand of the judge in restricting examinations and cross-examinations,—the long-drawn out and fruitless examination of witnesses over dreary wastes of irrelevant or immaterial matters. The needless multiplication of witnesses is another fault. So is the abuse of the right to introduce "expert" testimony, whereby proceedings are needlessly prolonged to the great cost of all concerned.

The glorification of technicalities is another fruitful source of delay. "The lawyer who goes into court to-day," said

Justice Brewer, "seems to feel that he is not living up to his profession if he does not quibble over every trifling detail and gain all delays possible. The ethics of the profession do not make this a reprehensible offense, but, if our greatest lawyers would set an example, others would follow, and in time conditions would be improved."

"Some lawyers would go on and talk for hours if you would let them," recently remarked a judge. Perhaps he was of the school of Lord Chief Justice North, of whom it is written: "He was careful to keep down repetition, to which the counsel one after another are very propense; and, in speaking to the jury on the same matter over and over again, the waste of time would be so great that, if the judge gave way to it, there would scarce be an end, for most of the talk was not so much for the causes as for their own sakes, to get credit in the county for notable talkers. And his lordship often told them that their confused harangues disturbed the order of his thoughts."

But the bench is not always justified in condemning the loquacity of the bar. A practice which undoubtedly has become common is the interruption of counsel. "If judges," Lord Halsbury once said, "would only appreciate what an invaluable assistance it is to their minds to listen to those who have prepared their arguments, and are perfectly familiar with the facts, they would recognize that initial listening, at all events, is most desirable." Lord Halsbury is not alone in perceiving how disadvantageous the interruption of counsel may be. "A garrulous judge," Lord Alverstone took occasion to observe not long ago, "is an intolerable nuisance, because he lengthens the proceedings and diverts attention from the points in the mind of the advocate."

Delay after Trial.

Are not the facilities for appeal from lower to higher tribunals too facile and the grounds of appeal often too trivial? Our judicial system permits the repeated and continuous resort to higher courts on appeal in a multitude of ways, delaying final adjudication of matters at issue. This elaborate system of appeals on every phase of litigation should be severely pruned to its simplest possible form, and retain the doing of substantial justice. In cases involving small values, appeals should not be allowed, or at least should be confined to one appeal, unless some important question is in issue, and the judge for that reason allows an appeal.

Generally, the time allowed in which to appeal is unnecessarily long.

The lengthy brief, filled with unverified citations which cannot be traced, or which, when discovered, are found upon critical examination to have but little, if any, application to the case in hand, entails an immense amount of useless work upon appellate courts.

Why should there be more than one trial upon evidence and the testimony of witnesses in any civil case? Could not the appellate court correct all errors, and decide the case upon the evidence and the law, without remanding it for another trial?

Under the present conditions, lawyers try their cases not so much on the actual merits, as to force technical errors into the record. The reversal of the just conviction of a guilty man upon purely technical points is the prime cause of want of confidence in our courts.

Three bills looking to the reform of judicial procedure have been drawn at the suggestion of the American Bar Association for the consideration of Congress. The most important of them is directed against the fact that technicalities are often made stumbling blocks for justice. This monstrous abuse may be corrected by a judicious application of the doctrine of harmless error.

Time might be saved, also, if the lower court opinions, a large proportion of which must be passed in review by the appellate courts, should be pruned to a minimum of verbosity, and prolix arguments on legal points which have been repeatedly decided should be omitted.

The Object of Reform.

The reason for reforming legal procedure is that substantial justice may be done. Only to that extent is it desirable. Care should be taken that justice itself is not sacrificed to the demand of the public for greater speed.

The Lurking Dictograph

DID you ever see a dictograph? Probably not. Very few people have. It is as elusive and unobtrusive as any eavesdropper. It never signalizes its presence. It may be hidden in a drawer, or concealed in the wall, or fastened to a desk. Wherever placed, it is sensitive to sound. It is said to exist in government bureaus, detective agencies, and the offices of banks and large corporations. It lurks in the haunts of conspirators, and catches the faintest whisper in the nooks where compacts of bribery are made. It grows spontaneously in the offices of labor unions and in the cells of suspects.

This formidable instrument is innocent enough in appearance, being the size of a small bread plate and perhaps an inch thick. It has the peculiar quality of magnifying a low tone or modifying a high one, so that the voice of the speaker becomes natural and is easily recognizable. A guarded conversation may be overheard and transcribed by stenographers who are several miles away.

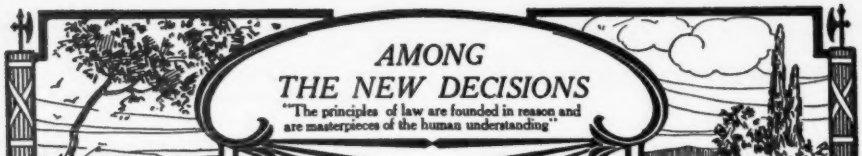
Perhaps it is not too much to say that the magical qualities of this device have largely contributed to the great reputation of William J. Burns, who was the first detective to use the dictograph in this country.

The Ohio supreme court has recently upheld the competency of evidence procured by means of the dictograph. The voice of the operator must, of course, be identified, and corroborative testimony as to the exact nature of the incriminating words may sometimes be necessary; but this is easily provided for by having several persons simultaneously transcribe the conversation.

The dictograph emphasizes the old proverb that "walls have ears." It gives added point to the words of a wise man who wrote nearly two thousand years ago: "Curse not the King; no, not in thy thought; and curse not the rich in thy bedchamber; for a bird of the air shall carry the voice, and that which hath wings shall tell the matter."

THE courts, their delays and the cost of litigation are justly criticized. There is no duty more imperative upon the bar and the bench than to do what they can to *simplify matters and put technicalities out of the way* and see to it that substantial justice is administered.

The seat of the whole trouble is in the fact that too many appeals are granted when justice does not demand it. A more simple way to put it is to say that our courts trifle with justice by permitting delay after delay upon mere technicalities.—Hon. David J. Brewer.



Attorney and client — misconduct of client — right to abandon suit. What is sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and in the nature of things cannot be. Each case must depend largely upon its own particular circumstances.

In the Michigan case of Genrow v. Flynn, 131 N. W. 1115, it is determined that an attorney who has received a sum of money to prosecute a suit to judgment may withdraw from the case without returning the money, if the client falsely charges him in a telegram with deceiving, lying, and neglecting him, and states that he does not intend to stand his abuse any longer, where he has performed services worth all he has received.

The case law dealing with this subject is gathered in the note appended to the report of this decision in 35 L.R.A. (N.S.) 960.

Automobile — absence of license — injury on highway — liability. That mere failure of the driver of an automobile to have secured the statutory license at the time his machine injured a pedestrian on the highway will not render him liable for the injury, unless such failure had some casual relation to the injury, is held in the Delaware case of Lindsay v. Cecchi, 80 Atl. 523, annotated in 35 L.R.A. (N.S.) 699.

In harmony with this case it was held in Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L.R.A.(N.S.) 701, that the mere failure to procure a license, as required by statute, will not render one so operating an automobile liable for injury caused by an accidental collision between his car and that of another driver on the highway.

Bank — unauthorized deposit — title — trust fund. But few cases have considered the question of the effect of a deposit of money in a bank by an unauthorized person to the credit of the owner of the fund. The Michigan case of Patek v. Patek, 131 N. W. 1101, annotated in 35 L.R.A.(N.S.) 461, holds that a bank gains no title to money of a man, deposited in it by his wife, without authority, where neither he nor his wife had any account there, even though the bank had no notice that the wife had no title to the money, or authority to deposit it. And a receiver of such bank must, in case the bank had on hand a sum in excess of such deposit at all times after it was made, return the amount to the true owner as a trust fund, in preference to claims of general creditors of the bank.

Constitutional law — buying of junk — prohibition. That part of an act entitled, "An Act to Protect Railway Property and Guard against Personal Injuries," passed May 9, 1908 (99 O. L. 465), which provides that "whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles (referring to journal brasses, nuts, bolts, etc., removed from railway cars, etc.), shall, upon conviction thereof, be imprisoned, is held in Kilbourne v. State, 84 Ohio St. 247, 95 N. E. 824, 35 L.R.A.(N.S.) 766, to be constitutionally invalid.

This decision seems to be the only one directly in point upon this question.

Criminal law — former jeopardy — verdict against insane person. A novel question was presented in the Pennsylvania case of Com. v. Endrukat, 80 Atl. 1049, reported with note in 35 L.R.A.(N.S.) 470, holding that one found by the jury to be insane at time of trial cannot plead former jeopardy when arraigned a sec-

ond time on the same charge, although the court accepted a verdict of guilty, which the jury returned together with its finding of insanity, if it subsequently set aside such verdict and granted a new trial.

Divorce — Indian custom — effect. A foreigner born in Canada immigrated to the United States, and was adopted by the Pottawottomi tribe of Indians. After his adoption into the tribe, and after his wife, who was a member of the tribe, had died, he married, as his second wife, a woman who was not a member of the tribe. While he was living with the tribe upon its reservation as a member thereof, and while the tribe was under the general supervision of the Federal authorities, he was divorced from his second wife according to the customs and usages of the tribe. It was held in the Oklahoma case of Cyr v. Walker, 116 Pac. 931, that this divorce, recognized by the tribe as valid under its customs and usages, would be recognized and treated as valid by the courts of the state.

The decisions upon the validity of divorce according to Indian custom are appended to the note accompanying this case in 35 L.R.A.(N.S.) 795.

Evidence — conduct of bloodhounds — instructions. Before evidence of the conduct of bloodhounds alleged to have been put upon the trail of the defendant can properly be received, it is held in the Kansas case of State v. Adams, 116 Pac. 608, that it should appear that the dogs in question were able, at the time and under the circumstances, to follow the scent or track of a person. When such foundation has been laid, and the evidence showing the conduct of the dogs has been received, a charge, in substance, that before the jury can consider such conduct, they must find that the dogs in question were accurate, certain, and reliable in following the trail of human footsteps; and, if they find from the evidence touching the matter that they were and are reliable and accurate in this regard, then the evidence of their work and its result may be considered, together with all the other evidence in the case, as a circumstance determining the guilt of the defendant,—is not prejudicially erroneous as to such defendant.

The recent decisions relating to the competency of evidence of trailing of persons by bloodhounds are appended to the report of the foregoing case in 35 L.R.A.(N.S.) 870, the earlier decisions having been collated in a note in 42 L.R.A. 432.

Insurance — fire — loss by theft. It may be laid down as a well-established rule of law in conformity with the decision in the Oklahoma case of Farmers' & M. Ins. Co. v. Cuff, 116 Pac. 435, annotated in 35 L.R.A.(N.S.) 892, that, in the absence of a provision in a policy of fire insurance exempting the insurer from liability for the loss of the insured goods by theft during a fire, the insurer will be liable for such loss, if the fire was the direct cause thereof.

Insurance — rebating premium — pari delicto — compelling full payment. The administrator of an insurance agent who granted a rebate on a premium contrary to the provisions of a statute, as an inducement to take out insurance with him, is held entitled in the Mississippi case of Rideout v. Mars, 54 So. 801, on the ground of public interest, to compel payment of the unpaid portion of the premium, although the parties were *in pari delicto*.

The result reached in this case, as appears by the note which accompanies it in 35 L.R.A.(N.S.) 485, seems to be at variance with other decisions involving the question.

Intoxicating liquors — interstate commerce — power of state court. The Oklahoma case of Gulf, C. & S. F. R. Co. v. State, 116 Pac. 176, 35 L.R.A.(N.S.) 456, seems to be one of first impression upon the power of a state to prohibit, by means of legislation or judicial action, the transportation from a point outside of the state of intoxicating liquors which it is known will be sold in violation of law. It holds that it is not within the power of the state courts to enjoin interstate carriers from receiving at points without the state, for transporta-

tion to and delivery to consignees at points within the state, shipments of spirituous, vinous, fermented, and malt liquors, and imitations thereof, "to persons who, they well know, immediately upon receiving possession thereof, intended to use said liquors in violation of the laws of the state," including certain persons therein alleged to have paid the "special tax required by the United States of liquor dealers," or "to any other person after said defendant handling the shipment has been reliably informed from credible source, either by circumstances or otherwise, that such person is a person who does not intend said shipment of liquor for his personal or family use, but in violation of the law of the state," said shipments being articles of interstate commerce.

Landlord and tenant — matured crops — time to gather. That a tenant is entitled to a reasonable time after the expiration of his lease to gather crops which had matured and were ready to harvest at that time is held in the Mississippi case of Opperman v. Littlejohn, 54 So. 77, to which is appended in 35 L.R.A.(N.S.) 707, a note dealing with the question, How long after the termination of the tenancy has the tenant for the removal of the crops to which he is entitled?

Libel — publication of portrait — charge against relative. The publication of a portrait of a girl, in connection with a statement that her father was about to be arrested for using the mails to defraud, is held in the Washington case of Hillman v. Star Pub. Co. 117 Pac. 594, not to be a libel within a statutory definition that it is a libel to expose any living person to hatred, contempt, ridicule, and obloquy, or to deprive him of the benefit of public confidence or social intercourse.

This decision seems to be one of first impression. It is accompanied in 35 L.R.A.(N.S.) 595, by a note in which illustrative cases are discussed.

Mandamus — against private individual — pretended officer. That mandamus will not lie to compel a private person to deliver the pleadings, papers, and files in a case pending in a certain court, to one who claims to have been the *de jure* and *de facto* clerk of said court since its organization, although it be alleged that such person wrongfully obtained possession of said papers and files by pretending to act as the clerk of said court, under claim of the right to said office, is held in the Oklahoma case of State ex rel. Wells v. Cline, 116 Pac. 767, which is accompanied in 35 L.R.A.(N.S.) 527, by a note discussing the cases relating to the subject of mandamus to compel one usurping office to turn over papers.

Money had and received — auction bid — rescission of sale — liability of auctioneer. That an action against the clerk of an auction will lie to compel the return of money paid on a bid, without an order from the seller, where the article purchased does not comply with the seller's warranty, and the sale is rescinded, and the article returned to and accepted by the seller, is held in the Iowa case of McClean v. Stansberry, 131 N. W. 15, which is accompanied in 35 L.R.A. (N.S.) 481, by a note in which the decisions relating to the liability of an auctioneer or clerk of an auction for the return of money are collated.

Monopoly — organization of purchasing agent. That the organization by jobbers of a corporation to purchase their supplies and do such other brokerage business as it can, to which they give their patronage unless unusual advantages are offered by others, in preference to the regular brokers through whom they had formerly made their purchases, is not a violation of the anti-trust act of Congress of 1890, is held in Arkansas Brokerage Co. v. Dunn, 97 C. C. A. 454, 173 Fed. 899, annotated in 35 L.R.A.(N.S.) 464.

Municipal corporation — commission government — constitutionality. A statute providing a commission form of government for cities between certain limits of population is held in the Washington case of State ex rel. Hunt v. Tausick, 116 Pac. 651, not to contravene a constitutional provision prohibiting the

granting of municipal charters by special laws, if there are several municipalities to which, it may be applicable, by the fact that it is not applicable to all cities of the state, and might, because of its local option features, be adopted by only a single municipality.

This decision is also authority for the proposition that a statute providing a commission form of government for cities will not be held invalid because that form of government may not commend itself to universal approbation.

It further decides that the fact that a statute creating a classification of cities which may adopt a commission form of government does not follow the lines of existing classifications, but embraces only a portion of the cities in them, does not render it void as creating an arbitrary classification, or amending or repealing existing charters in violation of a constitutional provision that municipal charters shall not be granted, amended, or repealed by special laws.

This case is accompanied in 35 L.R.A. (N.S.) 802, by a note in which the decisions on the constitutionality of the commission form of government are discussed.

Municipal corporation — police power — illegal exercise — liability. There is a dearth of authority upon the question of the liability of a municipality for the acts of its officers in removing trespassers from public grounds. The Louisiana case of Faucheux v. St. Martinville, 124 La. 959, 50 So. 809, annotated in 35 L.R.A.(N.S.) 435, holds that when the mayor of a town clears the banks of a stream of trespassers, in accordance with the will of the town council, he is performing a public duty, as the municipality has the authority to clear, in a legal manner, all public property from encroachment and trespass by private individuals; but when the mayor employs an irregular method, the municipality is responsible for any damages which may arise because of the employment of this irregular method.

Municipal corporation — widening street — agreement to move building. That charter power to acquire property for the purposes of widening a street does not authorize a municipal corporation to agree to move back a building and restore it to its former condition, in consideration of a deed to the land needed by it, is held in Wheeler v. Sault Ste Marie, 164 Mich. 338, 129 N. W. 685, which is accompanied in 35 L.R.A. (N.S.) 547, by a note in which the cases treating of the power of a municipality to acquire property for other than a money consideration are collected.

Note — contract to sell to maker — enforceability. An unusual question was presented in the case of Bell v. Pitman, 143 Ky. 521, 136 S. W. 1026, annotated in 35 L.R.A.(N.S.) 820, which holds that a contract by the holder of a note to sell it to the maker at a specified time before maturity, at a discount, is valid, and upon his repudiation of the agreement, and attempt to enforce payment of the note in full, the maker may set off his damages, represented by the agreed discount.

Note — secured by fraud — right of bona fide holder. When an illiterate colored woman over seventy years of age was, by false and fraudulent representations, induced to sign certain negotiable promissory notes and mortgages securing the payment of the same, under the belief that she was signing her last will and testament and a power of attorney, it is held in First Nat. Bank v. Wade, 27 Okla. 102, 111 Pac. 205, that such promissory notes are unenforceable in the hands of a bona fide holder; it appearing that the maker was free from negligence.

This case is accompanied in 35 L.R.A. (N.S.) 775, by a note containing the recent decisions relating to deception as to the character of the paper signed as a defense against a bona fide holder of negotiable paper, the earlier cases having been discussed in a note in 36 L.R.A. 434. From the authorities there reviewed, as well as from the cases decided since the preparation of that note, it may be laid down as a well-established principle of law that where one is induced by fraudulent representations as to the character of a paper he is about

to sign, to believe that he is signing and delivering an instrument other than a promissory note, and his ignorance of the true character of the paper is not attributable, in whole or in part, to his own negligence in failing to acquaint himself with its contents, and he does sign a promissory note, there can be no recovery thereon, even at the suit of a bona fide holder for value.

Railroad — parts of system — liability for contracts. A railroad company which controls another merely by owning a majority of its stock, and which has assembled it with others into a system known by its name, is held in Stone v. Cleveland, C. C. & St. L. R. Co. 202 N. Y. 352, 95 N. E. 816, not to become liable for the contracts of the controlled road, if it in fact maintains a legally distinct and separate organization.

From the note which accompanies this decision in 35 L.R.A.(N.S.) 770, it appears that stock control is usually associated with some joint traffic arrangement which, in some of the cases, has been held to make the roads partners and the controlling road liable on the principle of agency. In the absence of some such agreement to operate the roads in common, however, the mere fact that one road possesses stock control of another does not render it liable for the acts and contracts of the latter.

Time — hour for closing saloons — standard or solar. That the hour for closing saloons under a municipal ordinance must be determined by standard and not by solar time, where there is considerable difference between them, and the general business of the municipality is conducted by standard time, is determined in the Utah case of Salt Lake City v. Robinson, 116 Pac. 442, annotated in 35 L.R.A.(N.S.) 610, where the recent cases on the subject of standard or solar time as the criterion in determining questions dependent upon time are presented, the earlier decisions having been collected in 1 L.R.A.(N.S.) 364, and 6 L.R.A.(N.S.) 1046.

Vendor and purchaser — condition — breach — contract to repurchase. A question that apparently has seldom been before the courts was presented in the California case of Rogers Development Co. v. Southern California Real Estate Invest. Co. 115 Pac. 934, 35 L.R.A. (N.S.) 543, holding that a contract made by a conditional vendor, after default on the part of the vendee, to repurchase the vendee's interest, is capable of enforcement, although in its absence the vendor might have claimed a forfeiture under the terms of the original agreement.

Verdict — statement of amount in figures, with designation of value. Where numbers or figures are used in connection with a statement of value, they are to be understood as referring to dollars, unless a different intention appears. This rule applies to a statement in a verdict in a larceny case, of the value of stolen property. The omission to insert the word "dollars," or the corresponding mark, does not render the verdict indefinite. Such is the holding in Ex parte McLean, 84 Kan. 852, 115 Pac. 647, also reported in 35 L.R.A.(N.S.) 653, where the cases treating of the effect of the omission of the dollar sign or the word "dollars" from a verdict or judgment are discussed.

Recent English and Canadian Decisions

Admiralty — collision — action in rem — voluntary appearance — personal liability. That the liability of foreign owners domiciled abroad, of a vessel arrested in an action *in rem* in respect of a collision on the high seas, who appear and contest the action, counterclaiming against the plaintiff, is not (apart from any application for a statutory limitation of liability) limited to the value of the *res;* but that, their appearance being voluntary and their proceedings in the action amounting to a submission to the jurisdiction of the court, they are personally liable to the full extent of the damages proved, is held in The Dupleix [1912] P. 8.

Banks — account opened by principal in name of agent — right to undrawn balances upon revocation of agency. That a principal who pays money into a bank to the account of a person known at the bank to be his agent, upon the terms that the agent shall have authority to draw upon the account, has the power, upon determining the agency and revoking the agent's authority to draw upon the account, to require the bank to return any undrawn balance to him, is held in Société Coloniale Anversoise v. London & Brazilian Bank [1911] 2 K. B. 1024.

Contracts — statute of frauds — agreement not to be performed within a year. That a contract of service or employment for a definite period exceeding a year, but terminable on either side by six months' notice, is not, by the fact of its possible determination within a year, taken out of the provision of the statute of frauds, requiring a written memorandum of contracts which are not to be performed within a year, is held in Hanau v. Ehrlich [1911] 2 K. B. 1056, in which the English cases bearing upon the question are discussed at length. This decision is affirmed by the House of Lords, in [1912] A. C. 39.

Criminal law — appeal — verdict finding defendant guilty but insane. In Rex v. Machardy [1911] 2 K. B. 1144, it is held that one who has been convicted under a statute providing that where it is given in evidence on the trial of a person that he was insane so as not to be responsible according to law for his actions at the time of committing the offense, the jury may return a special verdict to the effect that the accused was guilty of the offense charged, but was insane at the time, whereupon the court shall order the accused to be kept in custody as a criminal lunatic, cannot appeal from the finding of the jury that he was insane, such finding being no part of the conviction, but a special verdict of the jury in relief of the prisoner. This decision, although upon a question of practice, is rendered of interest in this country by the existence of similar provisions relative to the trial and conviction of insane criminals.

Party wall — obligation to contribute to cost. No obligation to contribute to the cost of a wall as a party wall exists on the part of one who erects a building adjoining it without, however, resting any construction upon it, or putting beams into it, although he covers both walls at the top with a piece of metal to keep the water from between the two structures, and although by reason of the protection which it gives him against the weather he is not obliged to make his wall weatherproof. Avenue Realty Co. v. Morgan, Rap. Jud. Qubec, 20 B. R. 524.

Railroads — fires — statutory liability — storage of inflammable material near right of way. The conduct of the owners of a warehouse in storing their surplus stock of coal oil in barrels (the warehouse being full) in an inclosure contiguous thereto and adjoining the railroad right of way is not, in the absence of evidence to show that sparks alighting amongst the barrels would be apt to ignite the oil, or that fire from the grass would probably set fire to the barrels, such a reckless exposure of their property as to preclude their right to recovery, under a statute imposing upon the railway liability for fire started by its locomotives irrespective of negligence and giving it an insurable interest in property along its right of way, for the destruction of their building by fire set out by a locomotive, which, starting in the grass, spread among the barrels in the yard, which in burning set fire to the building. Winnipeg Oil Co. v. Canadian Northern R. Co. 21 Manitoba L. Rep. 274.

Will — construction — rule in Shelley's Case. The rule in Shelley's Case is held in Re McAllister, 25 Ont. L. Rep. 17, not to apply to a testamentary provision by which a testator gave his estate to his children, share and share alike, but went on to provide with respect to the share of one of his sons therein, "that he shall hold the same as trustee of his heirs, and use the income as he may see fit, and that he shall not be accountable for the expenditure of such income, but that it shall be left entirely to his judgment and discretion."

The Power of the Judiciary. An order made recently by a county judge in Nebraska is so unique as to deserve the immortality of type. It may be said by way of explanation that the opinion of the attorney general referred to was simply a copy of the statutory provision which require all official bonds to be filed with the county clerk. The order is as follows:

"Comes W. L. R. and asks the court to approve the bonds of the precinct assessors and turn them over to himself for safe-keeping, and refers the court to the opinion of the attorney general of the state of Nebraska, and says this is the law of the state until reversed according to law.

"And now this 3d day of January, 1912, after reading said opinion, and upon consideration whereof, I find that the said attorney general did not know what he was talking about. I find said opinion in conflict with common sense, and not the proper way to do business. If a bond is presented to this court, the bond will be filed and fully considered, and if approved will be recorded, and a certified copy furnished if required. Why should the legislature give everything in the way of fees to one officer? Is one vault better than the other? Why should the county assessor's bond be in the custody of the county judge and not his assistants? We know, the intention of the legislature in regard to the county assessor's bond, because it is regarded in the statutes. The same reason may be applied to precinct assessors. If not, why not? After all the bond of the assessor is nothing but Tom-foolery. Who ever heard of the bondsmen of the assessor being held to account for the acts of the assessor?

"It is therefore considered, adjudged, and decreed that the opinion of the attorney general and the law of the state of Nebraska stating that the county clerk should have the care and custody of the bonds of the precinct assessors is unjust, unlawful, and of no force, and ought to be annulled, and is hereby annulled and of no value in this court. Done under my hand and the seal of the county court this 3d day of January, 1912.

"C. G. L., County Judge.

"Recorded in entry record vol. 1, page 17."

And yet some tell us there is no such thing as judicial legislation.

His Peers. Henry W. Paine, the eminent Boston lawyer, says the Argonaut, once went to one of the interior towns of Maine, where a boy was on trial for arson. He had no counsel, and Mr. Paine was assigned by the court to take charge of his case. He discovered, after a brief interview with the boy, that he was half-witted. The jury, however, was composed of farmers who owned barns such as the defendant was alleged to have set on fire, and, in spite of the boy's evident weakness of intellect, they brought in a verdict of guilty. The presiding judge turned to Mr. Paine, and remarked: "Have you any motion to make?" Mr. Paine arose, and, in his dry and weighty manner, answered: "No, your honor; I believe I have secured for this idiot boy all that the laws of Maine and the Constitution of the United States allow—a trial by his peers."

A Fishy Pharaoh. M. Maspero, the famous French Egyptologist, tells in some reminiscences of an amusing experience which befel him on one occasion when bringing an Egyptian mummy to Europe. It was the mummy of a king, and an important contribution to Archæology, and M. Maspero fancied that the French Custom House officers would not

insist too rigidly upon payment of duty.

The first of these functionaries whom he encountered, however, insisted upon doing his full duty. He opened the box which contained the mummy, and exclaimed:

"Hallo, what have we here?"

"A Pharaoh,—a genuine Pharaoh of the sixth dynasty," said the scientist.

"A—a Pharaoh?" said the puzzled officer. "I don't seem to remember what the duty on Pharaohs is."

He set to work to look up "Pharaohs" in his tariff schedule, but found no such article entered in his list.

"This importation," said the officer, finally, "does not seem to be provided for under the statutes. We shall have to follow our usual rule in such cases, and class it with the highest taxed article of the kind that it seems to belong to. I shall classify your Pharaoh as dried fish."

Legal Hieroglyphics. In a country town of one of the New England states, whose population is less than in 1810, and where one lawyer now picks up the meager crumbs of a small practice, there once resided and practised a firm hardly second in point of ability and legal acumen to any in the whole state.

"The abilities and acquirements of the junior member of this firm," writes a correspondent, "had obtained for him among his legal brethren, the sobriquet of 'The Old Chancellor.' From specimens of his handwriting which I have observed, his skill with the pen was not inferior, but it would seem that his skill was not always exercised to its highest standard. One day, just before a term of court, he wrote an officer in the shire town of his county, asking him to have a certain important witness at court on a day close at hand. 'The Old Chancellor' was present at the time appointed, as was also the officer, but not the witness. The 'Chancellor' demanded why the witness was not forthcoming. The officer knew nothing of him. The attorney inquired if he did not get his letter, directing the officer to bring the party. The officer replied that he did get a letter from him (the attorney), but that he had been utterly unable to make out its contents; and exhibited the letter forthwith. 'The Old Chancellor' examined it carefully, but even with his knowledge of the subject-matter of its contents, he finally confessed himself utterly unable to literally decipher what was intended to be conveyed."

The Lawyer and the Pickpocket. A young attorney thoroughly city broke, who prides himself upon being never "taken in," tells the following sad story—it relates to the time he lived in Chicago:

"One evening after returning from the office, I missed my watch, an unusually handsome one given me by my father, and which I prized so highly that even during the vicissitudes of college days, in which everything else I had was 'loaned' for its equivalent in cold cash, I could never make up my mind to part with it. Of course I knew immediately that I had had my pocket picked on the street car. Thinking that the watch would be hard to dispose of on account of many identification marks, I telephoned the following advertisement to the morning papers:

" 'Anyone coming into possession (tactful, that, wasn't it?) of a gold watch, with the initials J. W. P. set in diamonds on the front case, last night, will receive a reward of $20, by returning the same to room 908 Fisher building. No questions asked.'

"The next morning dragged away, and no one came, but about 3 o'clock in the afternoon, I opened the door to a good looking young fellow, who proffered me the watch. True to my promise, I asked no questions, but handed over the twenty, and to celebrate my joy at getting back my treasure, proposed that we have a drink together. The man assented, and on the way to the nearest emporium we discussed topics of the day just as would any two men who had met in an ordinary business way. I marveled at his self-possession under the circumstances.

"He took his drink like a gentleman, and after the little ceremony we shook hands and separated. I went back to the office fairly gloating over my cleverness, and patted my watch pocket caressingly. No bulging shape responded. The

watch was gone. That darned crook had the watch and the twenty, too."

The Passing of the Circuit. In the office formerly occupied by the clerk of a United States circuit court, the seal which was in use for a long term of years is securely tied down with tape so that it can not be used. Attached to the seal is a pasteboard card bearing the last imprint of the circuit court seal, the center being an eagle with outstretched wings. On the card the retiring clerk had written the following lines:

"In Memoriam.

"Of all sad words of tongue or pen,
"Were those of 'Moon' who caused your end.
"A long, long rest of rust and ease.
"From daily use for vulgar fees.
"Drooped are your wings and hushed your screams,
"Your sudden death caused nightmare dreams."

Thus passes the glory of a historic court in which, in its palmy days, was laid the foundation of our great judicial system. Perhaps some muse of the law may hereafter feel inspired to recount, in epic verse, its rise, achievements, and fall.

Kentucky Lineage. Judge H. C. McCune takes his summer vacations up near timber line in Colorado. He holds somewhat of a record at landing a pound trout with ease, and prides himself on his knowledge of woodcraft in general. One day he burst into camp all enthusiasm over a new idea.

"Look," said the judge, "I have run across a bed of mint. We'll just make a nice smudge of it and dry a lot of trout to take to Kansas City with us."

The fire was started and the fish properly hung to dry, but when the judge presented them a week later to his Kansas City friends, there was a strong flavor of pennyroyal instead of mint, and his friends refuse to believe the judge's ancestors are from Kentucky.

But Judge McCune is not the only man whose conduct has led his admirers to doubt whether he could rightfully claim to be a son of old Kentucky.

When Speaker Champ Clark, of Missouri, was prosecuting attorney of Pike county, an old darky came into his office at Louisiana one morning, and, after beating around the brambles for a few minutes, brought forth the object of his visit.

"Wuzn' you bawn in Kentucky, Ma's Champ?" he inquired cautiously.

"Sure, Uncle Henry."

"I'se had 'spishuns you wuz, suh, mo'n once, but the other mawnin' when you make dat speech ag'in Sam Collins and say dat whisky wuz de greatest ebil in de worl' I begins to hab misdoubtments, suh."

"What's where I was born got to do with it, Uncle Henry? It's a fact, isn't it?"

"I'se bawn in Kentucky, myse'f, suh," said Uncle Henry, with pride, "an' I hain't givin' off no 'pinion on dat subjeck, but you'd please me clean down to de groun', suh, ef you'd tell me ef de persecutin' attorney has got to swear to his speech, er is he jis' talkin' to de jury."

Excelsior. A brief was filed in the supreme court by an Arkansas lawyer in a suit in which the amount involved was $74.40; but in which the principle at stake, as he views it, "is one freighted with mighty consequences, and on its ultimate decision and solution depends the fate of our republic."

The eloquent author of the brief stands for the courts and against the legislatures and Congresses. He praises checks and balances in one place thus:

"Dreamers, enthusiasts, and time servers are wont rashly to attempt to rein the prancing years, plunge their keen rowels into the ribs of Time, and have events come clattering white with foam beneath the stroke of their impetuous lash; but the fact is that the people in their upward and onward march toward freedom and happiness need both a 'spur and a drag' to guard them on the one hand against the Charybdis of their own rashness and impulsiveness, and on the other from the Scylla of external oppression by others."

The "ribs of Time" is especially good.

Mr. Taft's message on the Arizona recall was written before the brief was published, but there is little doubt that the following is original.

"The people seldom err in their second sober judgment, but they should beware lest they mistake license for liberty and an unreasoning will of a mob majority for law, and outraged Themis again abandoning Mother Terra, seek refuge behind the embattled walls of high Olympus. . . . We tremble for the future, if judicial acts and decisions are to be reviewed by a mob in the form of a recall."

But here is where Special Privilege gets its:

"When the Golden Calf is worshipped with an Eastern devotion, and all classes kneel at the shrine of its idolatry, whenever and wherever this modern foe to progress, freedom, and equality,—Special Privilege,—presents its miscreated front athwart the path, there will, I have no doubt, be an Heracles with his sickle like sword and brazen club to sever the hydra like head, and an Iolaus to sear the wound and prevent its growing out anew."

It will probably be admitted that that's going some. But listen:

"When that time, foretold in prophecy and invoked in poetry, shall come, and the Eagles of Victory shall have perched on the banners of Liberty, when Equality is enthroned and crowned, and men shall have learned to do right because it is right, that the soul of greatness is the greatest good, the Art in arts —ambition gratified—is how to meet men's wants, that the kingliness of power is its use, that unselfishness is the greatest virtue, and that wisdom's highest wisdom is to learn to give, then fair Themis will have found her higher, larger Love, a love whose brow she wreathes with flowers, and as she loves she consecrates, to one alone, mankind."

Pegasus there threw a shoe or two, but it is good stuff.

Any lawyer will tell you that that is doing very well in a cause involving $74.40,—and principle.

Pie Vanquished Plunderer. A masked bandit came to grief in Denver recently, when he was hit squarely in the face with a hot custard pie while he was looting the cash drawer in a downtown restaurant.

The robbery occurred about 4 o'clock. Just as the robber entered the place, Miss Ina Mouat, in charge of the place at night, walked forward from the kitchen in the rear.

In each hand she carried a steaming hot custard pie.

"Hold up your hands," commanded the robber.

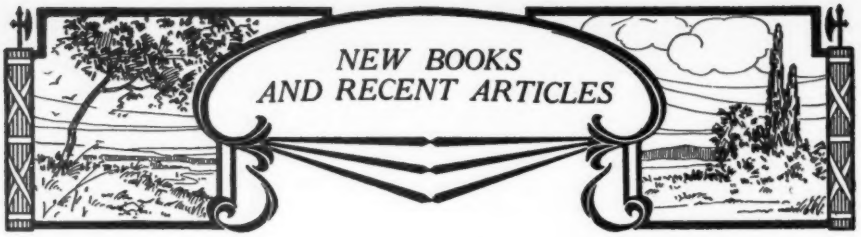
"I won't drop these pies for any villian like you," she replied.

"I don't care what you do with the pies, but don't move," the hold-up man said as he turned toward the cash register.

The young woman saw her opportunity and hurled one of the pies at him. It wasted the pie but it worsted the burglar. The soft part of the culinary delicacy struck him squarely, and the surprised robber dashed through the kitchen and disappeared.

Of course we know little or nothing about Denver pies. No pie produced according to the recipe that mother made could be used for offensive purposes. To strike a burglar with a pie of this character would merely make him clamor for more.

But, then, this was a restaurant pie, and the burglar is the best judge as to when he had enough.



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"1912 Supplement to Bloom's Treatise on the Law of Mechanics' Liens and Building Contracts." Buckram, $4.00.

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Odgers' "Pleading and Practice." (English.) Cloth, $4.00. Calf, $5.00

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"1912 Supplement to Federal Statutes, Annotated." 2 Vols. $12.00.

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Tucker's "Testamentary Forms and Notes on Wills." Buckram, $6.00 net.

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Action.

"The Conduct of an Action."—48 Canada Law Journal, 47; 32 Canadian Law Times, 121.

Appeal.

"Res Judicata as a Federal Question."—25 Harvard Law Review, 443.

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"The Lawyer of Fifty Years Ago and the Lawyer of To-day."—24 Green Bag, 64.

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"Can New York Rescind Its Ratification of the Proposed Income Tax Amendment?"—28 Bench and Bar, 44.

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"Are Agreements which Provide for Employment of Union Labor Exclusively Invalid as Contrary to Public Policy? "—74 Central Law Journal, 67.

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"Probation Orders."—76 Justice of the Peace, 86.

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"So-Called Equity Jurisdiction to Construe and Reform Wills."—6 Illinois Law Review, 485.

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"An Expert's View as to Expert Testimony."—44 Chicago Legal News, 215.

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"A Paving Problem. (Effect of use to make way 'a highway repairable by the inhabitants at large.')"—76 Justice of the Peace, 85.

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"Antenuptial Contracts in Illinois."—6 Illinois Law Review, 503.

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"Terrorism in America."—The Outlook, February 17, 1912, p. 359.

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"Marriage with Foreigners."—37 Law Magazine and Review, 129.

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"Actors and Actresses as Servants."—18 Case and Comment, 602.

"A Problem in the Drafting of Workmen's Compensation Acts. II."—25 Harvard Law Review, 401.

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"Recovery of Salary by a De Facto Officer.

II."—10 Michigan Law Review, 291.

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"Legal Aid for the Poor."—47 Law Journal, 67.

"Arrears under Maintenance Orders."—76 Justice of the Peace, 73.

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"Reform of Procedure by Rules of Court."—43 National Corporation Reporter, 893.

"Report of the Committee on Reform in Procedure to the Oklahoma Bar Association."—74 Central Law Journal, 64.

"Argument in Support of the Recommendation of the Committee on Reform in Procedure of the Oklahoma Bar Association."—74 Central Law Journal, 65.

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"Implied Powers of Agent for Sale of Land."—10 Michigan Law Review, 259.

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"The Recall of Judges—Distinguishing the Case of Taylor v. Beckham."—74 Central Law Journal, 82.

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"The Rights of the Holder of a Theatre Ticket."—18 Case and Comment, 574.

"The Child and the Theatre."—18 Case and Comment, 584.

"Religion, the Drama and the Law."—18 Case and Comment, 587.

"Themis and Thespis: Something about Lawyers Dramatists."—18 Case and Comment, 595.

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"The Law Relating to Commissions and 'Tips.'"—33 Australian Law Times, 54.

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"The Law as to Trade Secrets."—74 Central Law Journal, 83.

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"Trespass in Defense of Property."—76 Justice of the Peace, 49.

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"The Rule in Whitby vs. Mitchell (Right to limit remainder to take effect on the happening of a possibility, on a possibility.)"—12 Columbia Law Review, 199.

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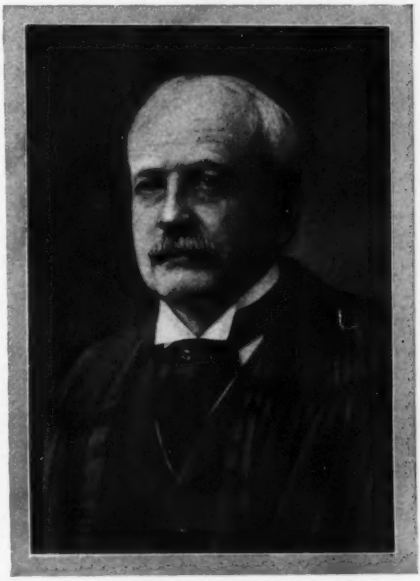
"The Withdrawal of Summonses."—76 Justice of the Peace, 61.

IT IS of course true that delays in judicial procedure are not peculiar to the United States. But in this country, where the courts are supreme and every action, enterprise or proceeding of government may be arrested, suspended or prevented by judicial process, long delays in deciding causes involving exercise of such stupendous powers are *defects in the political system so serious as to threaten its existence.—Hon. W. Bourke Cockran.*

Hon. Clarence Hale

Judge of United States District Court for Maine.



THE subject of this sketch was born in Turner, Maine, April 15, 1848, the third son of James S. and Betsey (Staples) Hale. His father was a typical prosperous Maine farmer, and his mother was distinguished for her fine mind and force of character. Both came of that sturdy New England stock whose descendants have accomplished so much in the world. Judge Hale's childhood and early youth were spent on his father's farm, among the picturesque Oxford hills. His education began in the public schools of his native town, and he finished his preparation for college at the Academy in the neighboring town of Norway. He entered Bowdoin College at the age of seventeen, and graduated in 1869 with high honors, among the first four of his class, and was elected to the Phi Beta Kappa. He then began the study of law with the firm of Hale and Emery in Ellsworth, Maine, composed of his brother Eugene Hale, afterward United States Senator from Maine, and Lucilius A. Emery, afterwards Chief Justice of Maine. After two years of study he was admitted to the bar and began practice in Portland in connection with Thomas B. Reed, afterward Speaker of the national House of Representatives. Later, the connection with Mr. Reed was dissolved, and Judge Hale began an independent practice in the same city. He soon rose to prominence as a lawyer, and while yet a young man acquired a large and lucrative practice in both the state and Federal courts. He numbered many leading business men and corporations among his clients, whom he served diligently and faithfully both in court and out. In 1879 he was elected city solicitor of Portland, and re-elected twice to the same office, the duties of which he performed with zeal and discretion, and with the approval of the citizens.

Judge Hale was a republican by political conviction, and began to take part in political matters as early as 1872, the year of Gen. Grant's re-election as Presi-

dent. While from his equable temperament he could not be a prejudiced partizan, nor an intolerant politician, he was of great service to the republican party as adviser and advocate. His services as a campaign speaker were sought for in every important campaign. In 1883 and 1885 he represented Portland in the state legislature, where he served on the leading committees, and won a place among the trusted leaders of the house. In committee and in the house itself, his ability and completeness of information always commanded attention and respect.

Though he had not previously held any judicial office or other high office, he had become so well known as a man and lawyer that he was, with the general approval of the profession, appointed by President Roosevelt, judge of the United States district court for the Maine district to succeed the distinguished Judge Nathan Webb.

From the time of his beginning of the study of the law, he gave promise of faithful service and of a distinguished and honorable career. Ex-Chief Justice Emery of Maine, who was in a measure his law teacher, says of him, that "he was a most assiduous student, seeking to know the spirit of the law as well as its body; its reasons as well as its rules." At the bar he was always *persona grata* to the court because of his thorough preparation, his clear understanding, and terse and lucid statements. He always appealed to reason, never to prejudice or sympathy, although he was of a very sympathetic temperament, and also could hate where hate was deserved. His manner was modest and therefore winning. His logic was correct and therefore convincing.

As a Judge of an important court he has justified the confidence of the President and of the bar. He is a faithful and diligent worker, a patient hearer, and prompt in working out a conclusion. His opinions, written and oral, show broad learning, deep thought, clear comprehension, and freedom from bias. With all his judicial work, however, he finds time for other service, such as director or trustee in various financial institutions, as an active member of the Maine Historical Society, as a member of the Board of Overseers of Bowdoin College, etc.

Also as a citizen, neighbor, and fellow man he is much esteemed. He is of a sympathetic and generous nature, appreciative of the good in others, and generous in expression of his appreciation. In religious faith he is a Congregationalist, and an active member of the State street Congregational Church in Portland, as well as a constant attendant at church services. He has an extensive acquaintance with good literature, which is apparent in his writings and conversations.

Judge Clarence Hale married March 11, 1880, Margaret Rollins, daughter of Franklin J. Rollins, a prominent citizen of Portland. They have children, Katherine married to Philip G. Clifford of Portland, a grandson of Nathan Clifford, former Justice of the United States Supreme Court; and Robert, a graduate of Bowdoin College with highest honors, and now a scholar in Trinity College, Oxford, on the Rhodes foundation, having won that scholarship through his high standing at Bowdoin.

Eccentric Attorney Dies at Eighty.

Santa Cruz, California, lost a highly esteemed pioneer and veteran attorney on February 18, in the death of Joseph H. Skirm, aged eighty, who was actively engaged in the practice of law up to the time he was tricken with pneumonia, a few days before his death.

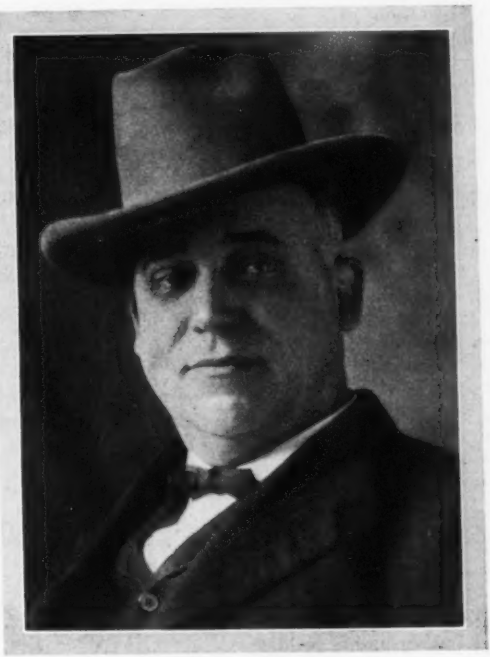
Each day he walked from his home to his office, a distance of 2 miles, never once riding on the street car. Despite his many peculiarities he was esteemed highly, and was once elected district attorney of the county.

Fifty years ago Mr. Skirm taught school at Soquel, 4 miles from Santa Cruz, walking back and forth each day, studying law as he did so. He became one of the best land attorneys in the state. He was well versed in five languages, including Greek and Latin. He never took a vacation in his life.

Hon. A. O. Stanley

A Kentucky Lawyer who is Chairman of the Special Congressional Committee to Investigate Violations of Antitrust Act

HON. Augustus Owsley Stanley is a son of an officer of the famed "Orphan Brigade" of the Confederate Army, that was recruited in 1861 from the very flower of the young manhood of Kentucky. His father is yet living, a clergyman of the Christian church. On the distaff side, Mr. Stanley is a scion of one of the most illustrious families of the state,—the Owsleys, who have played leading parts in the civic affairs of the "Old Commonwealth." Born in 1867, he is now in the prime of life, and as robust of body as he is virile of mind. Educated at Danville, so long the Athens of the Ohio valley, the young man was admirably equipped for public life.



HON. A. O. STANLEY

A student of men as well as a student of books, his success was assured. A Democrat politically, he is also a Democrat in demeanor, and no public man is more approachable; and that accounts for the fact that he has been the representative in Congress from the second Kentucky district longer than any other man in its history.

At the age of thirty-five, Mr. Stanley was elected to Congress. His district is one of the leading agricultural communities of the country, producing more tobacco than any other, besides immense crops of grain,—corn, wheat, oats, rye,—hay, vegetables, fruits, beef, pork, poultry, butter, and eggs. It is also a large producer of fine Bourbon whiskies, while the forests yield prolifically of lumber, and the mines immense quantities of coal. It is the Green river region, a stream the deepest in the world for the volume of water it discharges.

Mr. Stanley, early in his congressional career, became a member of the committee on agriculture, and he is the author of the measure repealing the tax of 6 cents a pound on tobacco in the leaf. So sound was his argument, and so persistent were his efforts, that after several sessions, this measure became a part of the Payne tariff law. While he is distinctively a constructive legislator, he is formidable in academic discussion, as was shown in his debate with Mr. Dalzell on the different schools of statecraft founded in our country by Jefferson and Hamilton.

In 1906 Mr. Stanley introduced a resolution directing the Department of

Justice to furnish all records at its command that tended to show that the American Tobacco Company was a combination in restraint of trade. This was the inception of the litigation which resulted in the dissolution of that monopoly by a decree of the Supreme Court. Mr. Stanley produced all the material evidence that made the government's case.

In the 61st Congress, Mr. Stanley sought to have a congressional investigation of the United States Steel Corporation, to ascertain if it too was a monopoly in defiance of law and restraint of trade. This resolution was referred to the judiciary committee, which reported it favorably. The Republican committee on rules, however, refused to report favorably a resolution ordering the investigation.

The succeeding Congress was Democratic. Stanley is one of its committee on rules, and a special committee of which he is chairman was created with authority to investigate the steel trust. The public is familiar with its labors. It discovered that the steel combination was capitalized at more than twice its cost, and that its cost was more than its value. It laid bare the scheme by which it acquired its chief rival, the Tennessee Coal & Iron Company. So searching was the scrutiny, and so startling were the revelations, that the administration instituted suit looking to a dissolution of the monopoly. But the public is familiar with all that.

Mr. Stanley never acts until he is fully prepared. He surveys all the ground. He is a practical man. As a practitioner at the bar, there is no more formidable advocate in all Kentucky, and at the same time he is thoroughly erudite in the principles and the philosophy of the law.

His friends hope, and are greatly encouraged to believe, that A. O. Stanley will yet represent his native state in the Senate.

Federal Practitioner Dies.

W. Wickham Smith, a member of the law firm of Curie, Smith, & Maxwell, with offices at No. 32 Broadway, New York, died on February 27th. He was assistant United States Attorney for the southern district of New York during President Cleveland's administration.

Mr. Smith practised largely in the Federal courts, having been in charge of many important classification, seizure, and criminal cases arising under the United States tariff laws. He was retained by the government as Assistant Attorney-General for the prosecution of recent customs fraud cases.

Death of Milwaukee Lawyer.

Thomas W. Spence, the last of the three founders of the well-known Milwaukee law firm, Quarles, Spence & Quarles, died suddenly in the supreme court room at Madison of heart disease. He was born in Ireland sixty-five years ago, and lived in Wisconsin for sixty years. He practised law in Fond du Lac and Racine, and twenty-five years ago, he with Charles and J. V. Quarles formed the law firm of which he was the last survivor.

Mr. Spence had won his way to the front among the able lawyers of Wisconsin, and held a high rank for many years. To unusual quickness of perception he added tireless industry. He was tenacious as well as brilliant. Kind in disposition and courteous in demeanor, he was sympathetic and cheerful in his intercourse with his fellow men, and made and retained friends in every walk of life.

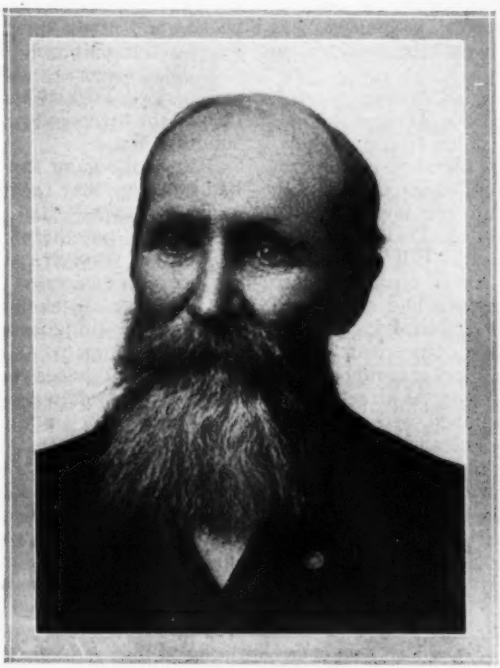
Death of Judge Lanning.

Taken ill while on the bench in Philadelphia, William M. Lanning, a judge of the United States circuit court, died on February 16, at his home in Trenton, New Jersey. He was sixty-three years old. With Judges Gray and Buffington, he was to have sat in the government suit against the United States Steel Corporation and its subsidiaries.

Hon. Seth Morton Tucker

Soldier and Pioneer Lawyer

BACK in 1846, Seth Morton Tucker, a young man then living at Marysville, Ohio, had the misfortune to lose his left hand by the premature discharge of a cannon. This accident led him to turn his thoughts from a business career to that of the profession of the law. After some years spent in studious preparation he was admitted to the bar in 1853, when twenty-three years of age.



The Civil War found him a resident of Atchison county, Kansas. He aided in raising the first company in Atchison, and was offered the first lieutenancy, but did not accept because he was informed that he would be rejected on account of his lost hand. Anxious to participate in the struggle, however, he succeeded in entering the next company raised, and was made first lieutenant of company B, 4th Kansas, afterwards the 10th Kansas.

He participated in the battles of Locust Grove, two engagements at Newtonia, at Cane Hill, Prairie Grove, and was in the engagements in the Price Raid. He acted as volunteer aide-de-camp to General Curtis in the battle of Westport, and was in many other engagements and skirmishes.

On retiring from the service he opened a law office at Fort Scott in 1865, where he practised until 1871. In 1865 he was appointed county attorney of Bourbon county to fill a vacancy, and in 1866 was elected to the same office. In that position he prosecuted the celebrated murder case against Major Mefford for the killing of Thomas Dilworth, and many other important state cases.

Before him, while he was justice of the peace in Fort Scott, the late Eugene F. Ware ("Ironquill") tried his first lawsuit.

In 1871 he removed to Wichita, where he practised his profession during the greater part of his remaining years. He served as a member of the Kansas house of representatives and was justice of the peace and police judge of Wichita.

Of Judge Tucker, a pioneer citizen of Wichita once said:

"There is one of the bravest men that ever lived. During the summer of '72 a gang of roughs came here from Texas. They were called the 'Texas gang', and a more desperate bunch than these rangers never existed. Under the leadership of 'Hurricane Bill'—Bill Martin was his name—they used to ride around shooting up the town and committing all kinds

of depredations, until the people were well-nigh frenzied.

"The citizens decided that it was about time to get rid of this gang, and as the local police force seemed unable to handle them, a sort of vigilance committee was formed. Why, these toughs always stood off the police in a fight. Shooting scrapes were common in those days, and saloons and hotels lined the streets. The city court and jail was then in the basement of the old court house at the corner of First and Main streets. We had a huge triangle of iron bars hung up outside, and when the citizens' committee was wanted, an alarm would be sounded on the triangle.

"Several times the alarm was sounded, and we went after the Texans, but always without avail. One afternoon, however, it did ring, and about 50 citizens reported, every one of them armed with shotguns, rifles, and revolvers. When the alarm was sounded, Tucker was sitting in his office with 'Bill,' afterward Judge, Campbell. Every business house and office in those days had some kind of a gun, ready for action, lying around handy, and in Tucker's office was a shotgun and a rifle. Tucker grabbed the shotgun and ran out into the street, closely followed by Campbell with the rifle.

"By the time the citizens had collected on the southwest corner of what is now Water and Douglas, the cowboys were on the opposite side, or, as it was known then, 'horse-thief corner.'

"There were enough revolvers, rifles, and shotguns in sight to equip an army. Bill Smith, who was marshal at the time, tried to persuade the citizens to disperse, declaring that if we tried to make any arrests trouble would be plentiful, and that some of us would be killed. Tucker came up about this time, and hearing Smith's caution, said: 'This is the third time I've been out on this kind of a call, and we have never made an arrest. I don't care for trouble; but I am used to it. Point out the man you want arrested, and I'll arrest him, kill him, or get killed.'

" 'All right,' said Smith. 'Arrest "Hurricane Bill." '

"A great silence fell over the mob, and as Tucker cocked one hammer of his gun the sound could be distinctly heard by everyone. Tucker immediately stepped into the street, while the eyes of the citizens were turned on him, and the Texans, tightly gripping their guns, watched their leader with breathless interest.

"Quickly leveling his gun at 'Hurricane,' Tucker said quietly but firmly, 'William, I want you; you are under arrest.'

"As the desperado attempted to lift his revolvers, Tucker cried: 'Lay down those guns!'

" 'You can have me,' said the bad man, as he dropped his two revolvers, one cocked and ready for business, the other a self-action pattern.

" 'Walk over to the police station,' commanded Tucker, and the fallen leader obeyed the command of the man who had subdued him.

"When the gang saw that their leader had given up, they became panic stricken, and all dropped their guns, and for a week after searchers reaped a harvest picking up revolvers in the weed patch on 'horse-thief corner.'

"We were all taken off our feet with surprise, the thing happened so quickly, but we soon recovered, and before that gang had a chance to make up their minds what to do we were all over there, and lined them up and marched them over to the police station, where they were fined over $600.

"That 'Hurricane Bill' was the worst scared man I ever saw. After the trial he said that he felt, when looking down the barrels of that shotgun, that it was the biggest thing he had ever seen in his life. He declared that each barrel was as big around as a stovepipe. He declared that as he looked down the barrels of that shotgun he counted eighteen buckshot in each barrel, and all of Tucker's arguments could not convince him that the eighteen shot were in both barrels and not in one.

"Well, that ended the depredations of the Texas gang in Wichita."

In religion, for sixty years and more he had an abiding faith that those whom we consider dead and gone are actively present in the affairs of mortals. His last words to his family were: "I will come back again to see you, and I will talk to you."

A Mail Order. A suit having been brought against a defendant, his counsel interposed a demurrer that had the effect to throw it out of court. Soon afterwards the same lawyer was elected to Congress, and while at his post of duty he was surprised one day to receive a letter from his former client, saying: "I am sued again. Please send me another one of them things they call demurrers."

A Pertinent Pleading. In the early days before it was either necessary or customary for lawyers practising at the bar of Kane County, Illinois, to receipt for records taken from the clerk's office, difficulties often arose. In the case in question, a personal injury case, the lawyers for the plaintiff and defendant appeared before the court to argue a demurrer to the plaintiff's declaration. The clerk being unable to find the declaration in question, a wrangle ensued between lawyers as to who had taken the declaration from the clerk's office, last. After the lawyer for the defendant had asserted very positively, that the plaintiff's lawyer had had possession last, plaintiff's lawyer replied as follows: "Your Honor, I'm sure I haven't got it, at least I'd be willing to swear to it; and further, your Honor, I am very anxious that this declaration be found, because it was drawn with special 'rifferince' to this case."

"In His Father's Suit." Colonel Winter Wimberly, of Macon, Georgia, enjoys a wide reputation as a story teller in Georgia, that land of story tellers, according to the New York Evening Sun.

Colonel Wimberly was once engaged in a case in which the plaintiff's son, a lad of eight years, was to appear as a witness.

When the youngster entered the box he wore shoes several sizes too large, a hat that almost hid his face, long trousers rolled up so that the baggy knees were at his ankles, and, to complete the picture, a swallow-tail coat that had to be held to keep it from sweeping the floor.

This ludicrous picture was too much for the court, but the judge, between his spasms of laughter, managed to ask the boy his reason for appearing in such garb.

With wondering look, the lad fished in an inner pocket and hauled the summons from it, pointing out a sentence with solemn mien as he did so. "To appear in his father's suit," it read.

Incapacitated. Quite a laugh was raised in the supreme court not long since by an official, who, when the judge called out for the crier to open the court, said: "May it please your Honor, the crier can't cry to-day because his wife is dead."

Damaging Slowness. "What 'bout dem chickens, Mr. Johnsing, dat Caspah dun stole—get dem back?"

"Some ob dem, Marcus. Yo' see I o'deh de cou't papahs onto him, but dey wer slow in gettin' ob dem out, an' Caspah's family bein' big, de chickens wer dun s'arved befor' de papahs. I jes' dun get de fedders."—Success Magazine.

High Water. Captain Joe Waters, a Kansas attorney, tried a case in Council Grove not long ago. The captain was up against it, and he turned on the tears and let them flow unrestrained while depicting the woes of his client.

It was a great and tearful speech. In the middle of it a brother attorney who was sitting by was observed taking off his shoes.

"What are you doing that for?" asked another lawyer.

"By gum!" replied the lawyer who was removing his shoes, "I'm getting ready to wade out. It's right sloppy round here already—and Joe ain't half through!"

Constitutional Rights. A lawyer in Spokane inquired of a fellow member of the bar if, after he had garnished a debtor's wages and his employer answered nothing due, if he could subsequently garnishee him again when there was something due him. Upon receiving an affirmative answer, he said: "What are you going to do about the provision of the law which says a man cannot be twice placed in jeopardy."

New Classification. A Spokane attorney was presenting a motion for a bill of particulars in a criminal case involving a statutory offense. He cited in his argument a case from the supreme court of California. The judge interrupted him with the query as to whether the citation was not a civil suit. "No, your Honor," the attorney replied, "Criminal Conversation."

Flushing the Sewers. In a case involving the validity of a sewer assignment, which had dragged along for nearly a week, the lawyer for the objectors, a son of old Erin, proceeded to address the jury in the following manner: "Gentlemen of the jury, I will now proceed to flush these dry sewers with the dew of me eloquence."

A Rushing Business. When James T. Brady, the celebrated New York lawyer, first opened an office, he took a basement room, which had been previously occupied by a cobbler. He was somewhat annoyed by the previous occupant's callers, and finally became irritable. One day an Irishman entered. "The cobbler's gone, I see," he said. "I should think he had," tartly responded Brady.

"And what do you sell?" he inquired, looking at the solitary table and a few law books.

"Blockheads," responded Brady.

"Begorra," said the Irishman, "ye must be doing a mighty fine business—ye hain't got but one left."

Subject to Attachment. A Chicago business man wrote his Wall street lawyer asking information touching the standing of a person who owed him a considerable sum of money for a long time.

"What property has he that I could attach?" was one of the questions.

The lawyer's reply was to the point.

"The man to whom you refer," was the answer, "died a year ago. He has left nothing subject to attachment except a widow."—Hampton's Magazine.

She Can! She Can! Marks—Would you marry a woman lawyer?

Parks—No, indeed. The ordinary woman can cross-examine quite well enough.

Seeking Legal Advice. Last week while Judge Daniel sat in his office, lost in wreaths of tobacco smoke and profound meditation, a shy-looking colored man dropped in, and, after satisfying himself that no one else was present, said he would like to ask a question. In his affable way the judge told him to proceed. Drawing closer to the judge, he asked in a real stage whisper: "Jedge, is hit again de law fo' a widder woman to keep boadahs?"—Shepherdsville News.

As It Will Be. Female Lawyer—"We want a writ of womanconfoundus." Opposing counsel (from the East)—"What in the world is that?" His native California colleague—"It's what we used to call mandamus."—Puck.

Dealt in Marine Stores. "The father of my client," said a solicitor last month, "is a marine door stealer." "A what?" said the magistrate. The solicitor thought deeply and replied, "I beg your worship's pardon, I mean a marine deal storer." "A what?" repeated the magistrate. The solicitor again apologized, and then smiling brightly, said, "A marine steal doorer." "Ah!" said the magistrate, and left it.—London Law Notes.